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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

~~No. 709~~ 14

HANDY AND HARMAN, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 5, 1931

CERTIORARI GRANTED MARCH 16, 1931

(35,631)

(35,631)

SUPREME COURT OF THE UNITED STATES

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vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 19467

HANDY AND HARMAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: Hugh S. Williamson, Esq., Paul Peyton, Esq.

For Commissioner: Eugene Meacham, Esq., Percy S. Crewe, Esq.

1926

Aug. 21. Petition received and filed.
" 21. Notification of receipt mailed taxpayer.
" 24. Copy of petition served on Solicitor.
Oct. 20. Answer filed by General Counsel.
" 29. Copy of answer served on taxpayer. General Calendar.

1928.

Aug. 23. Notice of hearing Oct. 15, 1928.
Sept. 4. Motion to continue hearing to some date subsequent to Jan. 1, 1929, filed by tapayer.
" 11. Motion granted to Spring term of 1929.

[fol. 2]

1929.

Jan. 29. Hearing set Feb. 21, 1929.
Feb. 4. Motion for a continuance to a date subsequent to April 20, 1929, filed by taxpayer.
" 6. Motion granted for hearing April 22, 1929.
Apr. 22. Hearing had before J. J. Marquette, Div. 1, on merits. Briefs due 6-17-29.
May 1. Transcript of hearing 4-22-29 filed.

1929.

June 12. Motion for extension to 6-27-29 to file brief filed by taxpayer 6-12 granted.
" 13. Motion for extension to 7-17-29 to file brief filed by G. C. See 19837.
" 15. Motion for extension to 7-17-29 granted.
" 27. Brief filed by taxpayer.
July 16. Brief filed by G. C.
Oct. 16. Findings of Fact and Opinion rendered. Mr. Marquette, Div. 1. Judgment will be entered for Commissioner.
" 18. Decision entered. J. J. Marquette, Div. 1.

1930.

Jan. 28. Motion for supplemental findings of fact filed by taxpayer 2/5 copy served.
Feb. 4. Hearing set Feb. 26-30 on motion for supplemental findings.
" 26. Hearing had before Mr. Marquette on petitioner's motion for supplemental findings of fact—Motion overruled.
" 27. Transcript of hearing 2-26-30 filed.
" 28. Order denying motion for supplemental findings entered.

[fol. 3]

Apr. 1. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by taxpayer.
" 1. Proof of service filed.
" 18. Præcipe filed by taxpayer.
" 18. Proof of service of præcipe filed.
" 18. Statement of evidence lodged.
" 18. Notice of lodgment of statement of evidence and of hearing on May 6, 1930, to approve said statement filed.
May 6. Objections to proposed statement of evidence filed by G. C.
" 6. Hearing had before Mr. Trammell, Div. 2, approval of statement of evidence—continued to May 14.
" 6. Order of continuance to May 14, 1930, on approval of statement of evidence entered.
" 14. Agreed statement of evidence approved and ordered filed.

1930.
May 14. Hearing had before Chas. M. Trammell—Div. 2—on approval of statement of evidence—statement approved.

Now, May 21, 1930, the foregoing Docket Entries, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 4] BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 19837

HANDY AND HARMAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: Hugh S. Williamson, Esq., Paul Peyton, Esq.

For Commissioner: Eugene Meacham, Esq., Percy S. Crewe, Esq.

1926.
Sept. 9. Petition received and filed. Taxpayer notified.
" 10. Copy of petition served on General Counsel.
Oct. 20. Answer filed by General Counsel.
" 29. Copy of answer served on taxpayer. General Calendar.
1928.
Aug. 23. Notice of hearing Oct. 15, 1928.
Sept. 4. Motion to continue hearing to some date subsequent to Jan. 1, 1929, filed by taxpayer. See 19467.
" 11. M[illegible] granted to Spring term 1929.

[fol. 5]

1929.

Jan. 29. Hearing set Feb. 21, 1929.
Feb. 4. Motion for a continuance to a date subsequent to April 20, 1929, filed by taxpayer. See 19,467.
" 6. Motion granted for hearing April 22, 1929.
Apr. 22. Hearing had before J. J. Marquette, Div. 1, on merits. Briefs due 6-17-29.
May 1. Transcript of hearing 4-22-29 filed.
June 13. Motion for extension to 7-17-29 to file brief filed by G. C. 6-15 granted.
" 12. Motion for extension to 6-27-29 to file brief filed by taxpayer 6-12 granted.
" 27. Brief filed by taxpayer. See 19,467.
July 16. Brief filed by G. C. See 19,467.
Oct. 16. Findings of fact and opinion rendered. Mr. Marquette, Div. 1. Judgment will be entered for Commissioner.
" 18. Decision entered, Mr. Marquette, Div. 1.
" 26. Motion to set aside order of redetermination and for settlement of final determination under rule 50 filed by taxpayer. 10-31-29 copy served on G. C.
" 30. Hearing set Nov. 19, 1929, on motion.
Nov. 19. Hearing had before Mr. Van Fossan on petitioner's motion to set aside order. Stipulation read into record, assigned to Mr. Marquette.
Dec. 10. Transcript of hearing 11-19-29 filed.
" 27. Order setting aside decision and redetermining deficiency entered.

[fol. 6]

1930.

Jan. 28. Motion for supplemental findings of fact filed by taxpayer 2-5-30 copy served.
Feb. 4. Hearing set Feb. 26, 1930.
" 26. Hearing had before Mr. Marquette, Div. 1, on petitioner's motion for supplemental findings. Motion overruled.
" 27. Transcript of hearing 2-26-30 filed.
Apr. 1. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

1930.

May 1. Proof of service filed.
" 18. Præcipe filed by taxpayer.
" 18. Proof of service filed.
" 18. Statement of evidence lodged.
" 18. Notice of lodgment of statement and of hearing on May 6, 1930, to approve said statement filed.
May 6. Objection to proposed statement of evidence filed by G. C.
" 6. Hearing had before Mr. Trammell, Div. 2, approval of statement of evidence continued to May 14.
" 6. Order of continuance to May 14, 1930, entered.
" 14. Agreed statement of evidence approved and ordered filed.
" 14. Hearing had before Chas. M. Trammell, Div. 2, on approval of statement of evidence—Ordered, statement approved.

Now, May 21, 1930, the foregoing Docket Entries, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 7] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19467

[Title omitted]

PETITION—Filed Aug. 21, 1926

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:CR:D-60D:LBW dated June 23, 1926, and as a basis for its proceeding alleges as follows:

The petitioner now is and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office at 57 William Street, New York City, New York State.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on June 23, 1926.

3. The taxes in controversy are income and profits taxes for the calendar year 1918 for $76,763.03 and for the calen-
[fol. 8] dar year 1919 for $3,156.90.

The deficiency in tax of $4,714.95 for the year 1918 is set forth and explained in Bureau letter of February 26, 1924, which is referred to in the notice of deficiency (a copy of which is attached and marked Exhibit A). Said deficiency was assessed in March, 1924, and on March 26, 1924, a claim for the abatement thereof was filed. The principal question involved related to the affiliation of petitioner and Hamilton & De Loss, Inc. The said notice of deficiency sets forth that said claim has been given due consideration and that the Bureau has ruled that petitioner and Hamilton & De Loss, Inc., are not affiliated for tax purposes, thereby rejecting said claim for abatement of the 1918 deficiency.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In that the Commissioner has ruled that petitioner and Hamilton and De Loss, Inc., are not affiliated for tax purposes for the years 1918 and 1919.

(b) In that the Commissioner exceeded his authority in reversing the ruling of a former Commissioner that petitioner and said Hamilton & De Loss, Inc., were affiliated during the taxable year 1918 within the purview of Section 240 of the Revenue Act of 1918.

[fol. 9] (c) In that the invested capital for the year 1919 is incorrectly computed because the determination thereof is effected by the aforesaid ruling with respect to the affiliation of petitioner and Hamilton & De Loss, Inc., during the taxable year 1918.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) A Ruling by the Commissioner in Treasury Department letter of April 10, 1920, holding that petitioner and Hamilton & De Loss, Inc., were affiliated during the year

1918 within the purview of Section 240 of the Revenue Act of 1918.

(b) Substantially all the stock of petitioner and said Hamilton & De Loss, Inc., is owned or controlled by the same interests.

(c) That although Hamilton & De Loss, Inc., was organized after August 1, 1914, to wit, December 26, 1916, it was organized for the purpose of taking over certain departmental operations of petitioner relating to the manufacturing of silver for silversmiths and was a successor to a then existing business within the intent and meaning of the following proviso of Section 240(a) of the Revenue Act of 1918:

"* * * Provided, that there shall be taken out of such consolidated net income and invested capital, the net in- [fol. 10] come and invested capital of any such affiliated corporation organized after August 1, 1914, and not successor to a then existing business, 50 per centum or more of whose gross income consists of gains, profits, commissions, or other income, derived from a government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive. In such case the corporation so taken out shall be separately assessed on the basis of its own invested capital and net income and the remainder of such affiliated groups shall be assessed on the basis of the remaining consolidated invested capital and net income. * * *"

Wherefore the petitioner prays that this Board may hear the proceeding and hold that petitioner and Hamilton & De Loss, Inc., were affiliated for tax purposes during the year 1918 within the purview of Section 240 of the Revenue Act of 1918.

Cortlandt W. Handy, Vice-President of Petitioner, 57 William Street, New York City. Breed, Abbott & Morgan, Attorneys for Petitioner, 32 Liberty Street, New York City.

[fol. 11] *Duly sworn to by Cortlandt W. Handy. Jurat omitted in printing.*

[fol. 12] EXHIBIT A TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:D-60D. LBW

June 23, 1926.

Handy and Harman, 59 Cedar Street, New York, New York.

SIRS: An examination of your income and profits tax returns and of your books of accounts and records for 1918 and 1919, discloses a deficiency in tax for the year 1919 of $3,156.90, as shown in the accompanying statement and schedule.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

[fol. 13] Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:D-60D LBW.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Enclosures: Statement, Form A, Schedule 1.

[fol. 14] Statement of Returns Examined and Resulting Tax Liability

Returns Examined

Company	Year	Form
Handy and Harman, 59 Cedar Street, New York, New York	1918	1120
	1919	1120

Tax Liability

Company	Year	Additional
Handy and Harman	1918	None
	1919	$3,156.90

The adjustments producing the above additional tax are explained in Bureau letters of February 26, 1924, and October 15, 1924, and Schedule 1 attached hereto.

The following claims have been given due consideration:

1918

Abatement	$21,086.04
Abatement	4,714.95
Refund	64,105.14
Refund	80,000.00
Credit	64,105.14
Credit	30,000.00

Waivers which will expire December 31, 1926, are on file for the years 1918 and 1919.

The Bureau has ruled that your company and Hamilton and De Loss, Incorporated, are not affiliated for tax purposes; therefore, the tax paid on the consolidated return [fol. 15] has been allocated as shown in Schedule 1.

A copy of this letter is being furnished your attorneys, Messrs. Breed, Abbott & Morgan, New York, New York, in accordance with authority conferred by your company.

Schedule 1

Year Ended December 31, 1919

Handy and Harman

Allocation of Taxes

Total tax, Schedule 5, Bureau letter dated October 15, 1924		$260,904.91
Previously assessed:		
Account #408,073	$257,840.26	
Amount allocated to Hamilton and De Loss, Incorporated	92.25	
Amount allocated to Handy and Harman	$257,748.01	257,748.01
Additional tax		$3,156.90

Now, May 21, 1930, the foregoing Petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 16] Before United States Board of Tax Appeals

Docket No. 19467

[Title omitted]

Answer—Filed Oct. 20, 1926

Comes now the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that a deficiency letter was mailed to the taxpayer on June 23, 1926.

3. Admits that the taxes in controversy are income and profits taxes for the years 1918 and 1919 and are in the amount of $79,919.93.

4. Denies that the Commissioner committed any error in holding that the petitioner was not affiliated with Hamilton & De Loss, Inc.

5. (a) For lack of sufficient information to form a belief, denies the allegations contained in paragraph 5 (a) of the petition.

[fol. 17] 5. (b) Denies that substantially all the stock of the petitioner and Hamilton & De Loss is owned or controlled by the same interests.

5. (c) Admits that Hamilton & De Loss was organized after Aug. 1, 1914; for lack of information denies the exact date of the organization of said company; denies that said company was a successor to a then existing business within the purview of Section 240 (a) of the Revenue Act of 1918.

6. Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue.

Of Counsel: J. H. Byrne, Special Attorney, Bureau of Internal Revenue.

JHB/mvb.

Now, May 21, 1930, the foregoing Answer certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 18] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19837

[Title omitted]

PETITION—Filed Sept. 9, 1926

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: CR:D-60D:LBW dated August 25th, 1926, and as a basis for its proceeding alleges as follows:

The petitioner now is and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office at 57 William Street, New York City, New York State.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on August 25th, 1926.

3. The taxes in controversy are income and profits taxes for the calendar year 1918 and for $76,763.03.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

[fol. 19] (a) In that the Commissioner has ruled that petitioner and Hamilton and De Loss, Inc., are not affiliated for tax purposes for the year 1918.

(b) In that the Commissioner exceeded his authority in reversing the ruling of a former Commissioner that petitioner and said Hamilton & De Loss, Inc., were affiliated during the taxable year 1918 within the purview of Section 240 of the Revenue Act of 1918.

(c) That of the alleged deficiency in tax of $25,800.99 for the year 1918, $21,086.04 thereof was paid on or about May 5th, 1923, by the Treasury Department's application thereto of a refund of that amount for the year 1917.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) A ruling by the Commissioner in Treasury Department letter of April 10, 1920, holding that petitioner and Hamilton & De Loss, Inc., were affiliated during the year 1918 within the purview of Section 240 of the Revenue Act of 1918.

(b) Substantially all the stock of petitioner and said Hamilton & De Loss, Inc., is owned or controlled by the same interests.

[fol. 20] (c) That although Hamilton & De Loss, Inc., was organized after August 1, 1914, to wit, December 26, 1916, it was organized for the purpose of taking over certain departmental operations of petitioner relating to the manufacturing of silver for silversmiths and was a successor to a then existing business within the intent and meaning of the following proviso of Section 240(a) of the Revenue Act of 1918:

"* * * Provided, that there shall be taken out of such consolidated net income and invested capital, the net income and invested capital of any such affiliated corporation organized after August 1, 1914, and not successor to a then existing business, 50 per centum or more of whose gross income consists of gains, profits, commissions, or other income, derived from a government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive. In such case the corporation so taken out shall be separately assessed on the basis of its own invested capital and net income and the remainder of such affiliated groups shall be assessed on the basis of the remaining consolidated invested capital and net income. * * *"

Wherefore the petitioner prays that this Board may hear the proceeding and hold that petitioner and Hamilton & De Loss, Inc., were affiliated for tax purposes during the [fol. 21] year 1918 within the purview of Section 240 of the Revenue Act of 1918.

Cortlandt W. Handy, Vice-President of Petitioner, 57 William Street, New York City. Breed, Abbott & Morgan, Attorneys for Petitioner, 32 Liberty Street, New York City.

Duly sworn to by Cortlandt W. Handy. Jurat omitted in printing.

[fol. 22] EXHIBIT A TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:D-60D. LBW

August 25, 1926.

Handy and Harman, 59 Cedar Street, New York, New York.

SIRS: Your claims for abatement of deficiencies in tax amounting to $21,086.04 and $4,714.95, respectively, assessed against you for the taxable year 1918 have been carefully considered by this office, and it is proposed to reject these in full for the reason that an examination of your return shows a tax liability equal to the amount previously assessed as indicated by letter of the Bureau dated June 23, 1926.

In accordance with the provisions of Section 283(c) or 283(k) of the Revenue Act of 1926, you are allowed 60 days (not counting Sunday as the sixtieth day) from the date of mailing this letter within which to file a petition with the United States Board of Tax Appeals, Earle Building, Washington, D. C., contesting in whole or in part the correctness of this determination.

[fol. 23] If you acquiesce in this determination and do not desire to file such petition, you are requested to execute waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:D-60D:LBW. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Enclosures: Statement, Form A.

Now, May 21, 1930, the foregoing Petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 24] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19837

[Title omitted]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits that a deficiency letter was mailed to the taxpayer on August 25, 1926.

(3) Admits that the taxes in controversy are income and profits taxes for the calendar year 1918 and are in the amount of $76,763.03.

(4) Denies that the Commissioner committed the errors alleged in paragraph (4) of the petition.

(5) (a) For lack of sufficient information to form a belief denies the allegations contained in paragraph 5, subdivision (a) of the petition.

[fol. 25] (5) (b) Denies that substantially all the stock of the petitioner and Hamilton & De Loss, Inc., is owned or controlled by the same interests.

(5) (c) Admits that Hamilton & De Loss, Inc., was organized after August 1, 1914; for lack of information denies the exact date of the organization of said company; denies that said company was a successor to a then existing business within the purview of Section 240 (a) of the Revenue Act of 1918.

(6) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue.

Of Counsel: J. H. Byrne, Special Attorney, Bureau of Internal Revenue.

JHB/mvb.

Now, May 21, 1930, the foregoing Answer certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 26] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467 and 19837.

HANDY & HARMAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

FINDINGS OF FACT AND OPINION

Promulgated October 16, 1929

1. The Commissioner had authority to reconsider and reverse the determination of his predecessor in office, that the petitioner and Hamilton & De Loss, Inc., were affiliated during the year 1918 and the period January 1, to February 1, 1919.

2. The petitioner and Hamilton & De Loss, Inc., were not affiliated during the year 1918 and the period January 1, to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918.

Hugh S. Williamson, Esq., for the Petitioner
Eugene Meacham, Esq., and C. E. Lowery, Esq., for the Respondent.

[fol. 27] These proceedings, which were duly consolidated for hearing and decision, are for the redetermination of deficiencies in income and profits taxes, asserted by the respondent in the amounts of $25,800.99 for the year 1918, and $3,156.90 for the year 1919. The only issue is whether the petitioner and Hamilton & De Loss, Inc., were affiliated

during the year 1918 and the period January 1, to February 1, 1919, and entitled to file consolidated returns of income and invested capital.

Findings of Fact

The petitioner is a corporation organized under the laws of New York in the year 1905, with its principal office at New York City. Its factory is located at Bridgeport, Connecticut. The petitioner, upon its organization, took over the business of the partnership of Handy & Harman, which for many years had been engaged in dealing in gold and silver bullion and specie, but its charter authorized it also to buy, sell and manufacture other metals.

Prior to the year 1906, the petitioner and the partnership of Handy & Harman had been supplying the silversmith trade with silver rolled into sheets and coils at their Bridgeport plant. About that time, however, the petitioner began the practice of cutting the silver into flat circles and rectangles so as to minimize the amount of scrap silver which would have to be returned by the silversmiths, thus saving in investment and in transportation and packing costs, and [fol. 28] enabling the corporation to operate on a lesser amount of raw materials than theretofore carried.

About 1912 or 1913, the officers of the petitioner conceived the idea of not only stamping out the flat circles and rectangles, but of partially shaping them, thus saving the silversmiths part of the hand labor required to shape the blanks on lathes, besides further reducing the amount of scrap. This, however, would have required the installation by the petitioner of large double-action presses which in one operation would cut out the flat pieces and stamp them into the preliminary shapes. For a year or two the petitioner's officers discussed whether this additional work should be undertaken and if so, whether it should be handled by the petitioner or by a separate corporation formed for that purpose. A strong reason for the adoption of the latter course was that because of the limited amount of silver business available it would be necessary, in order to keep the new equipment busy and justify the expense of installing it, to use it on the base metals as well as on silver, and the petitioner's officers desired to limit its operation to

the precious metals. Harry H. DeLoss, vice-president of the petitioner, discussed the matter at great length with Harold H. Hamilton, a man of many years experience in the silversmithing business, and it was finally decided to organize a new corporation with Hamilton at its head.

Accordingly, on December 23, 1916, the new corporation, Hamilton & DeLoss, Inc., was organized under the laws of Connecticut, with Hamilton as president and DeLoss as [fol. 29] vice-president. It was the intention at the time Hamilton & DeLoss, Inc., was organized, that the petitioner should continue to mill and roll silver, but that Hamilton & DeLoss, Inc., should take over the stamping operation and should extend the operation to the point of giving preliminary shape to the pieces, and in addition should operate in other metals. The petitioner continued to manufacture flat circles and rectangles after the organization of Hamilton & DeLoss, Inc., but it was the intention of the officers of both corporations that Hamilton & DeLoss, Inc., should take over all of that part of the business.

The capital stock of the petitioner and of Hamilton & DeLoss, Inc., were $650,000 and $300,000, respectively, divided into shares of $100 each, and at the beginning and the end of the year 1918 they were held as follows:

	January 1, 1918		December 31, 1918	
	Handy & Harman	Hamilton & De Loss, Inc.	Handy & Harman	Hamilton & De Loss, Inc.
Parker W. Handy.....	28.25%	21.28%	28.25%	16.67%
John L. Harman.....	18.40%	10.64%	18.40%	8.33%
Harry H. De Loss.....	28.23%	22.13%	28.23%	33.34%
William B. Sewell.....	15.75%	14.89%	15.75%	11.66%
George C. Gerrish.....	1.54%	3.40%	1.54%	3.33%
Robert H. Leach.....	1.54%	3.40%	1.54%	3.33%
Minority—scattered ...	6.29%	.....	6.29%	.....
H. H. Hamilton.....	.....	20.43%	.....	20.00%
John M. Blackburn....	.....	2.13%	.....	1.67%
Alfred C. Fones.....	.....	1.70%	.....	1.67%
	100.	100.	100.	100.

[fol. 30] The minority interest in the petitioner, consisting of 409 shares, was held in small lots by sixteen employees, and 300 of these shares, or 4.61%, were held under an agreement, a notation of which appeared on the certificate, that if the holder should leave the employ of the petitioner, the petitioner would have the right to buy back the stock at par.

When Hamilton & De Loss, Inc., was organized, Hamilton had no money to purchase stock therein. The purchase price of the 20% interest standing in his name was financed by promissory notes endorsed by Harry H. De Loss, and although the stock was issued to Hamilton he assigned it to De Loss, who deposited it as collateral security for the notes. Hamilton never paid anything on the notes. In 1919, he became insolvent and on February 1, 1919, De Loss paid the notes and took over the stock. During the period of his ownership of the stock Hamilton attended all meetings of the stockholders of Hamilton & De Loss, Inc., and voted his stock, but never voted in opposition to Messrs. Handy, Harman, Sewell and De Loss. John M. Blackburn and Alfred C. Fones took no active part in the business of Hamilton & De Loss, Inc. They were close friends of De Loss and their stock was voted for them by proxies given to De Loss.

Hamilton received a salary of about $10,000 a year from Hamilton & De Loss, Inc., but the other officers and directors, who were also officers, directors or employees of the petitioner, received no compensation from Hamilton & De Loss, Inc., but were paid entirely by the petitioner. De [fol. 31] Loss, who was vice-president of both corporations, devoted about one-third of his time to Hamilton & De Loss, Inc., and Robert H. Leach, who was technical advisor and administrative assistant of the petitioner, devoted his entire time to Hamilton & De Loss, Inc., but received his entire salary from the petitioner. George C. Gerrish was manager of the petitioner's Bridgeport plant and secretary of Hamilton & De Loss, Inc.

The plant of Hamilton & De Loss, Inc., was erected in Bridgeport, Connecticut, about one hundred or one hundred and fifty yards distant from the petitioner's plant, and silver production machinery costing $47,000 was installed. However, on account of war conditions work was so slow that at the end of January, 1918, the output of the plant has been small, the total sales thereof amounting only to $6,-295.35.

At the beginning of the year 1918, the petitioner and Hamilton & De Loss, Inc., were facing a difficult situation. The silver business had declined greatly. The officers were apprehensive that both corporations, they being in the class of non-essential industries, would be commandeered by the Government and disorganized. They were also encount-ing

difficulty in obtaining labor and raw material. After numerous discussions, both at board meetings and among the individuals who controlled the two corporations, it was decided that Hamilton & De Loss, Inc., should not for the present proceed with the silver stamping business for which it had been organized and equipped. It therefore became necessary, in order to continue the operation of the plant, [fol. 32] to secure work from the Government, and the corporation then went into production as sub-contractors on Government work. The petitioner also secured some sub-contracts, which were of benefit in placing it among the essential industries of the country.

In August, 1918, an officer connected with the gas mask division of the United States Army called on Harry H. De Loss at the petitioner's Bridgeport plant to ascertain whether that plant could mill brass for making eye pieces for gas masks. On being informed that it could, he inquired whether the plant could also stamp out the eye pieces. De Loss informed him that the work could not be done by the petitioner's plant alone, but that the petitioner also controlled the plant of Hamilton & De Loss, Inc., and that the work could be done in the two plants. After discussion among the officers and directors of the two corporations, and after several visits had been made to Washington by De Loss, with reference to the matter, it was decided to take the contract for the manufacture of eye pieces in the name of Hamilton & De Loss, Inc., principally because the billing work could be more conveniently handled through the offices of that company than through the New York office of the petitioner. However, the petitioner financed the contract, melted the metal, Hamilton & De Loss not being equipped for that work, rolled the metal and furnished it to Hamilton & De Loss, Inc., which stamped out the eye pieces, and returned the scrap metal to the petitioner for remelting. The entire contract was performed in that manner.

[fol. 33] The contract called for 1,000,000 eye pieces at 7½ cents each, and it necessitated the installation by Hamilton & De Loss, Inc., of machinery and equipment costing $32,000. The machinery that had been installed for silver production was not adapted to use on the eye piece contract, and it stood idle while that contract was being performed.

Neither the petitioner nor Hamilton & De Loss, Inc., made any profit from the eye piece contract. Hamilton & De Loss, Inc., sustained a net loss in the year 1918 and during January, 1919.

The petitioner and Hamilton & De Loss, Inc., originally filed separate returns for the year 1918, but subsequently filed a consolidated return for that year, and on April 10, 1920, the then Commissioner of Internal Revenue accepted the consolidated return and ruled that the two companies were affiliated during the year 1918 within the meaning of section 240 of the Revenue Act of 1918. On January 19, 1924, Commissioner Blair reversed the ruling made by his predecessor in office and held that the two companies were not affiliated, and he subsequently asserted deficiencies in tax against the petitioner in the amounts of $25,800.99 for the year 1918, and $3,156.90 for the year 1919.

Opinion

MARQUETTE: The first issue raised by the pleadings herein is whether Commissioner Blair had authority to reverse and set aside the finding of his predecessor in office that the petitioner and Hamilton & De Loss, Inc., were [fol. 34] affiliated during the year 1918 and the period January 1, to February 1, 1919, and entitled to file consolidated returns of net income and invested capital. This issue must be resolved in favor of the respondent on the authority of Yokohama Ki-Ito Kwaisha, Ltd., 5 B. T. A. 1248; Estate of W. S. Tyler, 9 B. T. A. 255; James Couzens, 11 B. T. A. 1040; Rosetta v. Hauss, 12 B. T. A. 755; Estate of John F. Dodge, 13 B. T. A. 201, and Anna T. Dodge, et al., Executors, 13 B. T. A. 223.

Our decision on the first issue makes it necessary for us to determine whether the petitioner and Hamilton & De Loss, Inc., were affiliated during the year 1918 and the period January 1, to February 1, 1919, and entitled to have their tax liability computed on the basis of consolidated returns, within the meanings and under the authority of section 240 of the Revenue Act of 1918.

The petitioner claims affiliation and the right to file consolidated returns, while the position of the respondent is, (1st) that affilation did not exist because the necessary conditions relative to ownership or control of the capital stock

of the two corporations were not present; (2nd) that even if the two corporations were affiliated their tax liabilities should not be computed on the basis of consolidated returns, for the reason that Hamilton & DeLoss, Inc., was a "corporation organized after August 1, 1914, and not a successor to a then existing business, 50 per centum or more of whose gross income consists of gains, profits, commissions, or other income derived from a Government contract or contracts made between April 6, 1917, and November 11, 1918, * * *." There is no claim made, nor does the [fol. 35] record disclose, that either one of the two corporations owned or controlled directly or indirectly, any of the capital stock of the other. If affiliation existed, it was because substantially all of the capital stock of both corporations was owned or controlled by the same interests.

The evidence herein establishes that six men, Handy, Harman, DeLoss, Sewell, Gerrish and Leach, owned outright 93.71% of the capital stock of the petitioner and 76.66% of the capital stock of Hamilton & DeLoss, Inc., and it may be assumed for the purpose of this opinion that they controlled 4.61% of the capital stock of the petitioner which was held by employees of the petitioner under an agreement that if they should leave the petitioner's employ the petitioner would have the right to purchase the stock. But did they control the 20% interest in Hamilton & DeLoss, Inc., owned by Hamilton? The evidence shows that when Hamilton & DeLoss, Inc., was organized Hamilton did not have sufficient money to purchase stock in the corporation. He secured the money from a bank pursuant to arrangements made by DeLoss and DeLoss endorsed his notes. Hamilton assigned his stock to DeLoss, who placed it with the bank as collateral security. On or subsequent to February 1, 1919, DeLoss paid the notes and took over the stock. The evidence also shows that as long as Hamilton owned the stock he attended the stockholders' meetings and voted the stock. It appears that he did not vote in opposition to Handy, Harman, DeLoss and Sewell, but there is no evidence that he could not have done so if he had de- [fol. 36] sired. So far as we know he voted with them of his own volition and not because they had any control over his stock. Handy, Harman, DeLoss and Sewell undoubtedly controlled Hamilton & DeLoss, Inc., and Hamilton apparently was a satisfied and tractable minority, who was

content that the Handy & Harman organization should control and operate Hamilton & DeLoss, Inc. This control, however, is not the control contemplated by the statute, and, where there is a substantial minority, unless there is a control of the stock of such minority, there is no affiliation of the corporation. Ice Service Co., Inc. v. Commissioner, 30 Fed. (2nd) 230; Commissioner v. Adolph Hirsch & Co., Inc., 30 Fed. (2d) 645, and Conley Tin Foil Corporation, 17 B. T. A. 65. In Ice Service Company, supra, it was stated:

Congress has declared that two corporations shall be treated as one for tax purposes when one corporation owns or controls substantially all the stock of the other or when substantially all the stock is owned or controlled by the same interests. Judicial interpretation may perhaps limit the statutory language to voting stock, as was held In Re Temtor Corn Etc. Products Co., 299 Fed. 326 [U. S. Tax Cases, 2nd Supp. 1325] aff'd sub. mom. Schafly v. United States, 4 Fed. (2d) 195 (C. C. A. 8), but we are not to confuse control of the corporation with control of the stock. The test is not declared to be control of the business or the policies of the subsidiary corporation but substantial [fol. 37] identity of interest in the enterprise. The theory of affiliation, resulting in a consolidated return for taxes is that the income and invested capital are really the income and capital of a single enterprise though carried on through the instrumentality of several corporations. See Art. 631, Treasury Regulations, 1920 Edition; Holmes, Fed. Taxes 6th Ed. 281; Alameda Inv. Co. v. McLaughlin, 28 Fed. (2d) 81 (N. D. Cal.). Only when the outside interest, that is, the interest of the minority, is so small as to be practically negligible, are the two corporations to be treated as in receipt of a single income requiring a consolidated return.

Again, in Adolph Hirsch & Co., supra, the same court said:

The management of the business of the corporation is not the control required by the statute. It refers to stock control. The fact that the minority is acquiescent and permits the majority to manage the business does not prove actual control over the minority interest. Nor does a control based upon friendship or professional relations satisfy

the statute. The control of the stock owned by the same interest refers to beneficial interest. This meaning is consistent with the purpose of the statute to extend to those subject to the hazard of the enterprise, when they are sub-
[fol. 38] stantially one and the same, the benefit of the consolidated reports.

We are of opinion that the same interest that owned or controlled the capital stock of the petitioner, did not own or control substantially all of the capital stock of Hamilton & De Loss, Inc. Therefore, the quantum of ownership or control required by the statute for affiliation of the two corporations does not exist in this case and we must affirm the action of the respondent in refusing to determine the tax liability of the petitioner and Hamilton & De Loss, Inc., on the basis of consolidated returns.

Judgment will be entered for the respondent.

Now, May 21, 1930, the foregoing Findings of Fact and Opinion, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 39] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 19467

HANDY & HARMAN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated October 16, 1929, it is

Ordered and decided: That there is a deficiency of $3,156.90 for the year 1919.

Enter.

John J. Marquette, Member United States Board of Tax Appeals.

Entered Oct. 18, 1929.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

Now, May 21, 1930, the foregoing Decision certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 40] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 19837

HANDY & HARMAN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated October 16, 1929, it is

Ordered and decided: That there is a deficiency of $25,800.99 for the year 1918.

Enter.

John J. Marquette, Member United States Board of Tax Appeals.

Entered Oct. 18, 1929.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

Now, May 21, 1930, the foregoing Decision certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 41] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19837

[Title omitted]

MOTION TO SET ASIDE ORDER AND FOR SETTLEMENT UNDER RULE 50—Filed Oct. 26, 1929

Comes now the above petitioner by its attorney, Hugh S. Williamson, and moves that the order of redetermination

in this cause, entered October 18, 1929, in which it was ordered and decided that there is a deficiency of $25,800.99 for the year 1918, be set aside and that the final order of the Board be entered pursuant to Rule 50 of the Board's Rules of Practice and for reason therefor states:

That the petition in this cause was based upon letter of the Commissioner of Internal Revenue dated August 25, 1926, rejecting claims for abatement for the year 1918 in the amounts of $21,086.04 and $4,714.95, respectively; that the total tax liability for the year 1918 as determined by the Commissioner of Internal Revenue and approved by [fol. 42] this Board is $222,278.76 and that such amount has been assessed; that of the aforesaid tax liability of $222,278.76 there has been paid the amount of $217,563.81, leaving an unpaid balance of $4,714.95.

Wherefore it is prayed that the order of redetermination of October 18, 1929, be set aside and that settlement of final determination be had under Rule 50 of the Board's Rules of Practice.

Hugh S. Williamson, Attorney for Petitioner, 15 Broad Street, New York, N. Y.

Now, May 21, 1930, the foregoing Motion to Set Aside Order and for Settlement Under Rule #50, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 43] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19837

[Title omitted]

ORDER SETTING ASIDE DECISION AND REDETERMINING DEFICIENCY

Whereas, on October 18, 1929, the Board entered its decision in the above entitled proceeding finding a deficiency for the year 1918 in the amount of $25,800.99, and

Whereas, the petitioner filed a motion to set aside such final decision and for settlement of final determination

under Rule 50, and the respective parties, by their counsel, having stipulated in open hearing that there is no deficiency for the year 1918,

Now, therefore, upon consideration thereof, it is

Ordered, that the said decision entered herein on October 18, 1929, be and the same hereby is set aside and revoked, and it is

[fol. 44] Further ordered and decided, upon redetermination, in pursuance with the stipulation of the respective parties, that there is no deficiency for the year 1918.

(Signed) John J. Marquette, Member United States Board of Tax Appeals.

Entered Dec. 27, 1929.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

Now, May 21, 1930, the foregoing Order Setting Aside Decision and Redetermining Deficiency, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 45] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

[Title omitted]

MOTION FOR SUPPLEMENTAL FINDINGS OF FACT—Filed Jan. 28, 1930

Comes now the above named petitioner by its attorney, Hugh S. Williamson, and moves that the Board make certain additional findings of fact in this proceeding as hereinafter set out, and in support of such motion shows:

That this proceeding came on for hearing before the Board on April 22, 1929. That thereafter on October 16, 1929, the Board promulgated its findings of fact and opinion and on October 18, 1929, entered its decision in Docket No. 19,837, determining a deficiency of $25,800.99 for the year 1918, and also entered its decision in Docket No. 19,467, determining a deficiency of $3,156.90 for the year 1919.

That thereafter, upon petitioner's motion, the Board set aside and vacated its said decision of October 18, 1929, in Docket No. 19,837 and on December 19, 1929, entered its decision determining no deficiency for the year 1918.

[fol. 46] That at the hearing of this proceeding, as aforesaid, petitioner introduced evidence to show that the then Commissioner of Internal Revenue had all the material facts before him on April 10, 1920, when he ruled that petitioner and Hamilton & De Loss, Inc., were affiliated for the calendar year 1918 and the period January 1 to February 1, 1919, and entitled to file consolidated returns of income and invested capital. That the respondent introduced no evidence tending to show that Commissioner Blair had any other or additional facts before him when he reversed said ruling of his predecessor in office; that the Board in its said findings of fact and opinion makes no finding as to whether or not Commissioner Blair had the same facts before him when he reversed said ruling of his predecessor in office and that petitioner deems such a finding material to the determination of whether or not Commissioner Blair had authority to so reverse said ruling of his predecessor in office.

The petitioner further shows that at the hearing of this proceeding before the Board, as aforesaid, certain documents were received in evidence and marked as Petitioner's Exhibits 8 and 9; that in its findings of fact as aforesaid the Board does not set out the contents of said exhibits and that petitioner deems the contents of said exhibits material to the determination of the question of affiliation presented in this proceeding.

Wherefore petitioner prays that the Board grant this motion and make supplemental findings of fact as follows:

[fol. 47] (1) The then Commissioner of Internal Revenue had all the material facts before him on April 10, 1920, when he ruled that petitioner and Hamilton & De Loss, Inc., were affiliated for the calendar year 1918 and the period January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918.

(2) When Commissioner Blair reversed said ruling of his predecessor in office he had before him the same facts as were before his said predecessor.

(3) When Commissioner Blair reversed said ruling of his predecessor in office he had before him no facts in addition to or other than those before his said predecessor.

(4) A finding setting out in full the contents of Petitioner's Exhibits 8 and 9.

In the alternative and in the event that the Board refuses to make any one of the findings as requested in (1), (2) or (3) above, petitioner prays that the Board then make supplemental findings of fact as set out in (5), (6) or (7), respectively, as follows:

(5) The then Commissioner of Internal Revenue did not have all the material facts before him on April 10, 1920, when he ruled that petitioner and Hamilton & De Loss, Inc., were affiliated for the calendar year 1918 and the period [fol. 48] January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918.

(6) When Commissioner Blair reversed said ruling of his predecessor in office he did not have before him the same facts as were before his said predecessor.

(7) When Commissioner Blair reversed said ruling of his predecessor in office he had before him facts in addition to or other than those before his said predecessor.

Respectfully submitted.

Hugh S. Williamson, Attorney for Petitioner, 15 Broad Street, New York City. Breed, Abbott & Morgan, 15 Broad Street, New York City.

Now, May 21, 1930, the foregoing Motion for Supplemental Findings of Fact certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 49] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19467

[Title omitted]

ORDER DENYING MOTION FOR SUPPLEMENTAL FINDINGS

A true copy. Teste:
B. D. Gamble, Clerk U. S. Board of Tax Appeals.

This proceeding came on for hearing February 26, 1930, on motion of the petitioner for supplemental findings of fact, Paul Peyton, Esq., appearing for the petitioner and H. Meacham, Esq., appearing for the respondent. After hearing the arguments of counsel and upon examination of the record herein the Board is unable to make the supplemental findings of fact requested in the petitioner's motion numbered 1, 2, 3, 5 and 7. As to motion set forth in request number 4, it appears that the exhibits mentioned therein are available to the petitioner as a part of the record on any review of this proceeding and it is therefore
[fol. 50] Ordered that the said motion for supplemental findings of fact be and the same hereby is denied.

Entered.

Entered Feb. 28, 1930.

(Signed) John J. Marquette, Member United States Board of Tax Appeals.

Now, May 21, 1930, the foregoing Order Denying Motion for Supplemental Findings, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 51] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed April 3, 1930

Notice to the Above-named Respondent and to C. M. Charest, General Counsel, Bureau of Internal Revenue, His Attorney

Please take notice, that on the 1st day of April, 1930, the petitioner, by its attorney, did present to and file

with the Clerk of the United States Board of Tax Appeals, its petition, copy of which is hereto annexed, for the review by the United States Circuit Court of Appeals for the Second Circuit, of the decisions of the said Board, on October 18, 1929, and December 27, 1929.

(Signed) H. S. Williamson, Attorney for Petitioner, 15 Broad Street, New York City.

[fol. 52] Service of copy of the above notice and copy of the attached petition for review is hereby accepted this 1st day of April, 1930.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Board of Tax Appeals Docket Nos. 19467, 19837

HANDY & HARMAN, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR REVIEW—Filed April 1, 1930

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the petitioner, Handy & Harman, and respectfully shows:

[fol. 53]. First. Petitioner is a corporation organized under the laws of the State of New York with its main office and principal place of business in the City of New York, County and State of New York.

Second. This petition is made for a review of a decision of the United States Board of Tax Appeals in Docket No. 19,837 entered December 27, 1929, approving the action of the Commissioner of Internal Revenue in rejecting petitioner's claims for abatement of income and profits taxes for the calendar year 1918 in the amount of $25,800.99 and the decision of the United States Board of Tax Appeals

entered October 18, 1929, in Docket No. 19,467, wherein said Board approved a deficiency of $3,156.90 for the calendar year 1919. Said decisions were entered in pursuance of certain findings of fact and opinion of said Board promulgated October 16, 1929. These cases were duly consolidated for hearing and decision before the United States Board of Tax Appeals.

Third. The income and profits tax returns of petitioner for the said periods were filed with the Collector of Internal Revenue for the Second District of New York, whose office is located within the district over which the Court of Appeals for this circuit has jurisdicton.

Fourth. The petitioner and Hamilton & De Loss, Inc., originally filed separate returns for the year 1918 but subsequently filed a consolidated return for that year and on [fol. 54] April 10, 1920, the then Commissioner of Internal Revenue accepted the consolidated return and ruled that the two companies were affiliated during the year 1918 within the meaning of Section 240 of the Revenue Act of 1918. On January 19, 1924, Commissioner Blair reversed said ruling of his predecessor and held that the two companies were not affiliated, and he subsequently rejected petitioner's claims for abatement for 1918 aggregating $25,800.99 and asserted a deficiency for 1919 in the amount of $3,156.90. Upon appeal to the United States Board of Tax Appeals, the Board held that Commissioner Blair had authority to reverse the determination of his predecessor in office; that petitioner and Hamilton & DeLoss, Inc., were not affiliated during the year 1918 and the period January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918, and thereupon entered its decisions as aforesaid approving the determination of the Commissioner. Thereafter petitioner filed a motion for supplemental findings of fact which was denied by the Board in its order entered February 28, 1930.

Fifth. The issues presented here are, first, whether Commissioner Blair had authority to reverse the determination of his predecessor in office; and, second, if this Court finds that Commissioner Blair had such authority, whether petitioner and Hamilton & DeLoss, Inc., were affiliated within the meaning of Section 240 of the Revenue Act of 1918 during the period January 1, 1918, to February 1, 1919, and

[fol. 55] entitled to file consolidated returns of net income and invested capital.

Sixth. The errors committed by the United States Board of Tax Appeals upon which the petitioner relies as the basis of this proceeding are as follows:

(1) The Board erred in refusing to find that the facts concerning which the witness, DeLoss, testified were presented to the then Commissioner of Internal Revenue prior to April 10, 1920.

(2) The Board erred in refusing to find as requested in petitioner's motion for supplemental findings that the then Commissioner of Internal Revenue had all the material facts before him on April 10, 1920, when he ruled that petitioner and Hamilton & DeLoss, Inc., were affiliated for the calendar year 1918 and the period January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918.

(3) The Board erred in refusing to find as requested in petitioner's motion for supplemental findings that when Commissioner Blair reversed said ruling of his predecessor in office he had before him the same facts as were before his said predecessor.

(4) The Board erred in refusing to find as requested in petitioner's motion for supplemental findings that when [fol. 56] Commissioner Blair reversed said ruling of his predecessor in office he had before him no facts in addition to or other than those before his said predecessor.

(5) The Board erred in holding that Commissioner Blair had authority to reverse and set aside the finding of his predecessor in office that the petitioner and Hamilton & DeLoss, Inc., were affiliated during the year 1918 and the period January 1 to February 1, 1919, and entitled to file consolidated returns of net income and invested capital.

(6) The Board erred in holding that substantially all of the stock of petitioner and Hamilton & DeLoss, Inc., was not owned or controlled by the same interests.

(7) The Board erred in failing to find and hold that substantially all of the stock of petitioner and Hamilton

& DeLoss, Inc., was owned or controlled by the same interests.

(8) The Board ered in failing to hold that Hamilton & DeLoss, Inc., was a successor to a business existing at the time of its organization within the meaning of Section 240 of the Revenue Act of 1918.

(9) The Board erred in holding that petitioner and Hamilton & DeLoss, Inc., were not affiliated for the year 1918 and the period January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918, and [fol. 57] entitled to file consolidated returns of net income and invested capital.

(10) The Board erred in failing to find and hold that petitioner and Hamilton & DeLoss, Inc., were affiliated within the meaning of Section 240 of the Revenue Act of 1918 and entitled to file consolidated returns of net income and invested capital for the year 1918 and the period January 1, 1918, to February 1, 1919.

Wherefore your petitioner prays that this Court may take such steps as may be necessary to review the action of the United States Board of Tax Appeals in this cause, reverse its decision and direct the Board to enter a decision redetermining the income and profits taxes of petitioner for the years 1918 and 1919 upon the basis of affiliation with Hamilton & DeLoss, Inc., and for such other and further relief as may to this Court appear proper in the premises.

Hugh S. Williamson, Attorney for Petitioner, 15 Broad Street, New York City. Breed, Abbott & Morgan, 15 Broad Street, New York City.

[fol. 58] *Duly sworn to by Hugh S. Williamson. Jurat omitted in printing.*

Now, May 21, 1930, the foregoing Petition for Review, Notice of Filing and Proof of Service, certified from the record as true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 59] BEFORE THE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

HANDY & HARMAN, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

Statement of Evidence—Filed May 14, 1930

The above case came on for hearing before the Honorable John J. Marquette, a member of the United States Board of Tax Appeals, on the 22nd day of April, 1929, pursuant to notice of hearing theretofore given, petitioner being represented by its counsel, Hugh S. Williamson, and the respondent by his counsel, Eugene Meacham and C. E. Lowery. Prior to the introduction of testimony, the member of the Board made the following announcement:

"Without objection let the record show that these proceedings in dockets 19,467 and 19,837 are consolidated for hearing and decision."

The petitioner to maintain the issues on its behalf introduced the oral testimony of Cortlandt W. Handy, George C. Gerrish, Harry H. DeLoss and Robert H. Leach, and various documents marked Petitioner's Exhibits 1 to 11, [fol. 60] inclusive, which were duly admitted in evidence. In its findings of fact the Board of Tax Appeals has set forth the substance of the oral testimony and a portion of the documentary evidence, which findings of fact are hereby adopted and incorporated herein by reference as a partial statement of the evidence.

Subsequent to the promulgation by the Board of its findings of fact and decision, the petitioner filed a motion for supplemental findings of fact based upon the testimony of Harry H. DeLoss, which motion was denied by the Board. In the petition for review of the Board's decision, error has been assigned by reason of the denial of said motion.

The findings of fact as made by the Board of Tax Appeals include the substance of the testimony of Harry H. DeLoss but do not show what particular findings therein are based upon the testimony of said Harry H. DeLoss. The Board has also failed to set out in its said findings the contents of Petitioner's Exhibits 9 and 10, which were duly

identified by said DeLoss and thereupon offered and received in evidence.

Said HARRY H. DELOSS, being called as a witness on behalf of petitioner, after having been duly sworn, testified as follows:

That he had been connected with Handy & Harman since its organization in 1905, having been one of the organizers and a director of the corporation; that prior to the forma- [fol. 61] tion of the corporation he had been associated with the partnership of Handy & Harman since 1900 or 1901 and that prior to 1906 the petitioner and the partnership of Handy & Harman were not doing any stamping work but had been supplying the silversmith trade with silver rolled into sheets at their Bridgeport plant. That about 1905 or 1906, the petitioner began the practice of cutting the silver into flat circles and rectangles; that about 1912 or 1913, the idea was conceived of not only stamping out the flat circles and rectangles, but of partially shaping them; that it was realized that additional machinery and equipment would be needed for this work and that an additional working organization with an experienced man at the head of it would be necessary. That for a year or two petitioner's officers discussed whether this additional work should be undertaken and, if so, whether it should be handled by petitioner or by a separate corporation formed for that purpose. That it was finally decided to organize a separate corporation for the reason that, due to the limited amount of silver business available, it would be necessary, in order to keep the new equipment in operation and to justify the expense of installing it, to use it on the base metals as well as on silver, and the petitioner's officers desired to limit its operation to the precious metals. That he also discussed this matter at length with Harold H. Hamilton, a man of many years experience in the silversmithing business, and that when it was decided to organize a separate corporation it was also decided to make Hamilton head of that corporation. That on December 23, [fol. 62] 1916, the new corporation, Hamilton & DeLoss, Inc., was incorporated under the laws of Connecticut, with Hamilton as president and DeLoss as vice president. That Hamilton at that time was in debt and had no money with which to purchase stock in the new corporation and that he

(DeLoss) arranged with the Connecticut National Bank for Hamilton to borrow money on his note to pay for the 20% of the stock issued to him; that he endorsed the notes given by Hamilton and the stock which was issued to Hamilton was immediately assigned to him and deposited with the bank as collateral security for the payment of the notes. That Hamilton never paid anything on the notes and that later he (DeLoss) paid all the notes with interest and took over the stock.

At this point the witness identified two documents which were offered and received in evidence as Petitioner's Exhibits 9 and 10. Exhibit 9 is in the following words and figures:

EXHIBIT 9

"Irrevocable Stock Power

Know all men by these presents that Robert W. Higgins, for value received, has bargained, sold, assigned and transferred, and by these presents do- bargain, sell, assign, and transfer unto H. H. DeLoss, six hundred shares of capital stock of Hamilton & DeLoss, Inc., standing in my name on the books of the —— and — do hereby constitute and appoint —— —— true and lawful attorney, irrevocable, for [fol. 63] —— and in — name and stead, but to — use, to sell, assign, transfer and make over, all or any of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that — said Attorney, or — substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 9th day of January, 1918.

(Signed) Frank Craig. (Signed) Robert W. Higgins. (L. S.)

Sealed and delivered in the presence of ——.

(Back of Page 1)

STATE OF ——,
—— of ——,
County of ——, ss:

On the — day of ——, in the year one thousand nine hundred and ——, before me personally came —— ——, to

me known to be the individual described in and who executed the foregoing instrument and acknowledged that he executed the same."

[fol. 64] Exhibit 10 is in the following words and figures:

EXHIBIT 10

"Irrevocable Stock Power

Know all men by these presents that H. H. Hamilton, for value received, has bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign, and transfer unto Robert W. Higgins, six hundred shares of capital stock of Hamilton & De Loss, Inc., standing in my name on the books of the —— and — do hereby constitute and appoint —— —— true and lawful attorney, irrevocable, for —— and in — name and stead, but to — use, to sell, assign, transfer and make over, all or any of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that — said Attorney, or — substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 20th day of December, 1917.

(Signed) L. B. Rowe. (Signed) H. H. Hamilton. (L. S.)

Sealed and delivered in the presence of —— ——.

[fol. 65] (Back of Page 1)

STATE OF ——,
—— of ——,
County of ——, ss:

On the — day of ——, in the year one thousand nine hundred and ——, before me personally came —— ——, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that he executed the same."

The witness thereupon further testified as follows:

That he devoted one-third of his time to the affairs of Hamilton & De Loss, Inc., during 1918 and 1919; that he

received no salary from that corporation; that he was also active at that time in the affairs of petitioner and received during that time a salary from petitioner; that he was vice president of petitioner and vice president of Hamilton & De Loss, Inc.; that Hamilton received a salary of about $10,000 a year from Hamilton & De Loss, Inc., but that no other officer or director of Hamilton & De Loss, Inc., received any salary from that company during the year 1918. That John M. Blackburn and Alfred C. Fones were stockholders of Hamilton & De Loss, Inc., but took no active part in the affairs of that company; that they were his close friends and that their stock was voted by him by virtue of proxies given him.

[fol. 66] That during 1917 and 1918, petitioner's business decreased 35% or 40% due to war conditions; that difficulties were experienced in the erection of the plant and installation of machinery for Hamilton & De Loss, Inc., on account of war conditions and that it was some time after the incorporation of Hamilton & De Loss, Inc., that the plant was ready to operate and that the output of the plant had been small up to January, 1918. That at the beginning of the year 1918, the silver business had declined greatly; that the officers were apprehensive that both corporations, they being in the class of non-essential industries, would be commandeered by the government and disorganized. That for these reasons and because of the difficulty in getting proper help and supplies, it was decided by the officers of petitioner and Hamilton & De Loss, Inc., after numerous discussions, not to continue with the silver stamping business for which Hamilton & De Loss, Inc., had been organized and equipped. That it became necessary in order to continue the operation of the plant to secure work from the government, and the corporation then went into production as subcontractors on government work. That the petitioner also secured some subcontracts, which were of benefit in placing it among the essential industries of the country.

That in August, 1918, an officer connected with the gas mask division of the United States Army called on him at the petitioner's Bridgeport plant to ascertain whether that plant could mill brass for making eye pieces for gas masks. That on being informed that it could, the officer inquired

[fol. 67] whether the plant could also stamp out the eye pieces. That he was informed that the work could not be done by the petitioner's plant alone, but that the petitioner also controlled the plant of Hamilton & De Loss, Inc., and that the work could be done in the two plants. That after discussion among the officers and directors of the two corporations, and after he (De Loss) had made several visits to Washington with reference to the matter, it was decided to take the contract for the manufacture of eye pieces in the name of Hamilton & De Loss, Inc., principally because the billing work could be more conveniently handled through the offices of that company than through the New York office of the petitioner. That the petitioner financed the contract, melted the metal, Hamilton & De Loss, Inc., not being equipped for that work, rolled the metal and furnished it to Hamilton & De Loss, Inc., which stamped out the eye pieces and returned the scrap metal to the petitioner for remelting. That the entire contract which called for 1,000,000 eye pieces at 7½¢ each was performed in that manner.

That neither the petitioner nor Hamilton & De Loss, Inc., made any profit from the eye piece contract and that Hamilton & De Loss, Inc., sustained a net loss in the year 1918, and during January, 1919.

That the plant of Hamilton & De Loss, Inc., was not constructed with the idea of engaging in the manufacture of war materials; that petitioner was organized primarily to handle precious metals and was engaged in dealing in such metals and in stamping circles and squares but was [fol. 68] not engaged in stamping shaped material; that it was the intention at the time Hamilton & De Loss, Inc., was organized that the petitioner should continue to mill and roll silver but that Hamilton & De Loss, Inc., should take over the stamping operation and should extend the operation to giving preliminary shape to the pieces and in addition should operate in other metals.

Thereupon testimony was given as follows:

"Q. Mr. De Loss, you made numerous trips to Washington, did you not, prior to April, 1920, in respect to some matters as to which you have testified here today?

A. Yes.

Q. Do you know of your own knowledge whether or not the matters to which the testimony has referred so far today in this hearing was presented to the then commissioner of internal revenue?

A. I don't think I get the nature of your question.

Q. You have been here, have you not, throughout this hearing, Mr. De Loss?

A. Yes.

Q. In respect to the matters about which you have testified, is it or is it not true that prior to April, 1920, those same facts were presented to the then commissioner of internal revenue?

A. Yes.

Q. You yourself personally came down to Washington in connection with such presentation of facts, did you not?

A. Yes.

Q. Do you remember appearing before the Committee on Appeals and Review prior to April, 1920, in connection with this matter and in connection with the presentation of facts about which you have testified?

A. I don't remember about the Committee on Appeals [fol. 69] and Review. I made one or two trips down here, but there were a good deal of other things on my mind at the time.

Q. Well, on the occasion of those trips, were they in connection with this matter of Hamilton & De Loss?

A. Well, on——

Q. And Handy & Harman?

A. On the consolidated return; yes.

Q. And you at that time presented the facts about which you have testified here?

A. Yes."

The foregoing is the substance of all the evidence adduced at the trial of said proceeding, pertaining to assignment of error one to five inclusive.

(Sgd.) Hugh S. Williamson, Attorney for Petitioner.

Approved and ordered to be filed May 14, 1930.

C. M. Trammell, Member Board of Tax Appeals.

Agreed to:

C. M. Charest, General Counsel, Bureau Internal Revenue.

Now, May 21, 1930, the foregoing Statement of Evidence, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

(Seal.)

[fol. 70] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Apr. 18, 1930

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above stated case, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, duly certified as correct, copies of the following documents and records in the above entitled cause:

(1) Docket entries of the proceedings before the Board.

(2) Pleadings before the Board, including motions filed on behalf of petitioner and copies of the notices of deficiency attached to and made a part of the petitions.

(3) Findings of fact, opinion, decisions and orders of the Board.

(4) Petition for review, together with proof of service of notice of filing such petition, and proof of service of copy of such petition.

[fol. 71] (5) Statement of the evidence as settled and allowed.

(6) This præcipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., April 15, 1930.

Hugh S. Williamson, Attorney for Petitioner.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

[Title omitted]

NOTICE OF FILING PRÆCIPE—Filed Apr. 18, 1930

To C. M. Charest, General Counsel, Bureau of Internal Revenue, attorney for respondent:

[fol. 72] Please take notice that on the 18th day of April, 1930, we filed with the Clerk of the Board of Tax Appeals, a præcipe, designating the portions of the record to be transmitted to the Circuit Court of Appeals for the Second Circuit, on the review taken in the above cause, a copy of which præcipe is hereto annexed and herewith served upon you.

Dated New York, N. Y., April 15, 1930.

Hugh S. Williamson, Attorney for Petitioner.

Service of the foregoing notice and attached copy of præcipe is hereby accepted this 18th day of April, 1930.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Now, May 21, 1930, the foregoing Præcipe, with Proof of Service thereon, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

(Seal.)

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

B. T. A. Nos. 19467 and 19837. C. C. A. No. —

HANDY AND HARMAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MOTION FOR ORDER OF SUBSTITUTION

Comes now David Burnet as Commissioner of Internal Revenue, by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows to the Court;

That since the filing of the petition for review in the above-entitled cause, Robert H. Lucas, who was at that time Commissioner of Internal Revenue, and who was the respondent at that time in the above-entitled cause, has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted;

That said Robert H. Lucas ceased to be Commissioner of Internal Revenue on August 15, 1930;

That David Burnet was duly ap-ointed as Commissioner of Internal Revenue to succeed the said Robert H. Lucas and has duly qualified as said Commissioner of Internal Revenue;

That on August 20, 1930, David Burnet became Commissioner of Internal Revenue, and ever since that time has been and now is Commissioner of Internal Revenue;

Wherefore, it is accordingly prayed that the above-entitled cause be revived so that this action will be pending against the said David Burnet, as Commissioner of Internal Revenue, and the said David Burnet, as Commissioner of Internal Revenue, may be substituted as the respondent in this cause for the said Robert H. Lucas, formerly Commissioner of Internal Revenue.

[fol. 74] It is further shown to the Court that there is substantial need for so continuing and maintaining this cause because if it is not so continued and maintained the order of the United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality, or obtain a refund thereof.

It is also shown to this Court that the said David Burnet, as Commissioner of Internal Revenue, by and through his attorney, has caused to be mailed to the attorney of record for the petitioner in the above-entitled cause a copy of this motion to revive this action in the name of David Burnet, as Commissioner of Internal Revenue, and to have his name substituted as the respondent in this cause.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for David Burnet, as Commissioner of Internal Revenue.

Duly sworn to by C. M. Charest. Jurat omitted in printing.

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER GRANTING MOTION FOR SUBSTITUTION—Filed Nov. 18, 1930

A motion having been made herein by counsel for the Respondent to substitute David Burnet, Commissioner of Internal Revenue, in the place and stead of Robert H. Lucas, Commissioner of Internal Revenue, as respondent herein,

Upon consideration thereof it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 76] [File endorsement omitted.]

[fol. 77] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HANDY & HARMAN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before L. Hand, Swan, and Chase, Circuit Judges

Appeal From the United States Board of Tax Appeals

The taxpayer has petitioned for review of orders of the Board of Tax Appeals in consolidated proceedings relating to income and profits taxes for the years 1918 and 1919. Affirmed.

Breed, Abbott & Morgan, Attorneys for Petitioner; Hugh S. Williamson, Paul L. Peyton, of Counsel.

G. A. Youngquist, Assistant Attorney General, for Respondent; J. Louis Monarch, John H. McEvers, Special Assistants to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue; Percy S. Crewe, Special Attorney, Bureau of Internal Revenue, of Counsel.

OPINION

SWAN, Circuit Judge:

Handy & Harman is a New York corporation. Hamilton & De Loss, Inc., is a Connecticut corporation. The issue [fol. 78] presented by this appeal is whether from January 1, 1918, to February 1, 1919, they were affiliated corporations within the meaning of section 240(b) of the Revenue Act of 1918 (40 Stat. 1057). The commissioner ruled against affiliation and denied the use of consolidated returns in determining the petitioner's taxes for the years in question. His action was confirmed by the Board, whose findings of fact and opinion are reported in 17 B. T. A. 980.

Six men owned 93.71 per cent of the stock of Handy & Harman, the remaining shares being owned by employees and most of them being held subject to the corporation's option to repurchase should the shareholder leave its employ. The same six men also owned, in somewhat different proportions, 76.66 per cent. of the stock of Hamilton & De Loss, Inc. An additional twenty per cent. of the stock of this corporation stood in the name of H. H. Hamilton, who was not a stockholder in Handy & Harman. It is the contention of petitioner that Hamilton's stock was owned or controlled by Harry De Loss who was one of the six men owning shares in both corporations. Unless this was so, concededly there was a failure to prove affiliation within the statutory definition requiring "substantially all" of the stock of the two corporations to be "owned or controlled by the same interests." / See Ice Service Co. v. Commissioner, 30 F. (2d) 230 (C. C. A. 2); Commissioner v. Adolph Hirsch & Co., 30 F. (2d) 645 (C. C. A. 2).

The contention that Mr. De Loss did own or control Mr. Hamilton's stock is based upon the facts now to be stated. Hamilton & De Loss was caused to be organized by the officers and majority shareholders of Handy & Harman to take over a department of latter's silversmithing business. Mr. Hamilton, a man of experience in silversmithing, was in- [fol. 79] vited to become president of the new corporation. He was without funds to purchase shares and Mr. De Loss made arrangements with a bank whereby Hamilton borrowed the necessary money upon his notes endorsed by De Loss. Hamilton executed an "irrevocable stock power" assigning his stock in Hamilton & De Loss to Robert M.

Higgins who in turn executed a similar instrument assigning the stock to De Loss, "who deposited it as collateral security for the notes." Hamilton never paid anything upon the notes. In 1919 he became insolvent and on February 1, 1919, De Loss paid the notes and "took over" the stock. Prior to the last mentioned date Hamilton attended all stockholders' meetings of Hamilton & De Loss and always voted his stock in harmony with the men who controlled both corporations Hamilton received a salary from Hamilton & De Loss, but its other directors and officers were also officers or employees of Handy & Harman and received their compensation solely from the latter corporation even though all or a large part of their working hours were devoted to the former. On these facts the Board held that Hamilton's stock was not owned or controlled by De Loss prior to February 1, 1919, and the correctness of that ruling is the issue before us.

It is consistent with the findings and the evidence that the indirect assignment of Hamilton's shares to De Loss was as security for the latter's endorsement of Hamilton's notes. Indeed, we do not understand it to be claimed that the assignment made De Loss the beneficial owner; nor, if such were the claim, do we think the evidence would support it. De Loss testified "that he endorsed the notes given by Hamilton and the stock which was issued to Hamilton was immediately assigned to him and deposited with [fol. 80] the bank as collateral security for the payment of the notes." Why the assignment was made through Higgins does not appear. We regard the transaction as a pledge by Hamilton to De Loss and a repledge by him to the bank. It can hardly be doubted that had Hamilton paid his notes, De Loss' interest in the stock would have terminated. Hence, De Loss did not "own" Hamilton's shares, and the question is narrowed to whether he "controlled" them.

In United States v. Cleveland P. & E. R. Co., 42 F. (2d) 413 (C. C. A. 6) Judge Mack thoroughly reviewed the legislative history of the statute in question and the judicial decisions which have construed it. His opinion demonstrates that the courts are not in accord as to the meaning to be given to the word "control" in determining whether or not affiliation exists. One line of cases holds that when the corporations are operating as a business unit, actual

control of the voting power of the minority stock is sufficient, though based on revocable proxies, relationships of blood or friendship, or perhaps even more acquiescence of the minority. To the authorities cited by Judge Mack as upholding this view may be added the later cases of Kile, & Morgan Co. v. Commissioner, 41 F. (2d) 925 (C. C. A. 1); J. Rogers Flannery & Co. v. Commissioner, 42 F. (2d) 11 (C. C. A. 3); Commissioner v. Richfield Oil Co., 42 F. (2d) 360 (C. C. A. 9); Eby Shoe Co., Inc. v. United States, 44 F. (2d) 273 (Ct. Cl.). If this view be accepted it can scarcely be doubted that Hamilton's stock was "controlled" by De Loss and his associates.

The other line of cases adopts a narrower interpretation, and holds that if "control" means something different from ownership of stock, it must at least be a control legally [fol. 81] enforceable. See authorities cited in United States v. Cleveland P. & E. R. Co., supra. This court is already committed to the narrower view, Commissioner v. Adolph Hirsch & Co., supra; and we are disposed to adhere to it until an authoritative voice declares it wrong. It is impossible to say that De Loss had a legally enforceable control of Hamilton's shares before he paid the note and "took over" the stock. We may assume, without deciding, that a pledgee who is the registered shareholder upon the books of the corporation, "controls" the shares. Cf. Lavenstein Corp. v. Commissioner, 25 F. (2d) 375 (C. C. A. 4). If we go further and assume that a pledgee of the shares who has the power to get them registered in his name "controls" them even before the power is exercised, DeLoss still falls short. See Appeal of Iron City Electric Co., 4 B. T. A. 1178. The Board found that he "deposited" the stock with the bank as collateral security for the notes. We can scarcely believe that this means that he did not transfer to the bank the same title that he himself had received as security for his endorsement; but even if the certificates were merely "deposited", without the execution of an assignment to the bank, his situation is no better. If, as seems probable, the security title was transferred to the bank then it had whatever "control" belongs to a pledgee; if, on the other hypothesis, the certificates were merely deposited without assignment, this too would disable DeLoss from getting the shares registered in his name, for only upon presentation of the old certificates would the cor-

poration issue new ones, and the old ones could not be reclaimed from the bank without payment of the notes. There-
[fols. 82 & 83] fore until the notes were paid DeLoss did not have the rights of a pledgee who is in possession of stock certificates with the power of having them immediately registered in his name, even if it be assumed that the "control" of such a pledgee would be sufficient.

The moral control arising from the pressure which could be put on Hamilton to make him vote with DeLoss and his associates is not, we think, the thing expressed by the statute. There must be the legal power through ownership or control of substantially all the stock to direct the policies of both corporations for affiliation to exist. As to Hamilton's stock that was lacking. Accordingly we think the Board was right, and its orders are affirmed.

[fol. 84] In United States Circuit Court of Appeals,
Second Circuit

Handy & Harman, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Appeal from the United States Board of Tax Appeals

Judgment—Filed Jan. 12, 1931

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders of said United States Board of Tax Appeals be, and hereby are, affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

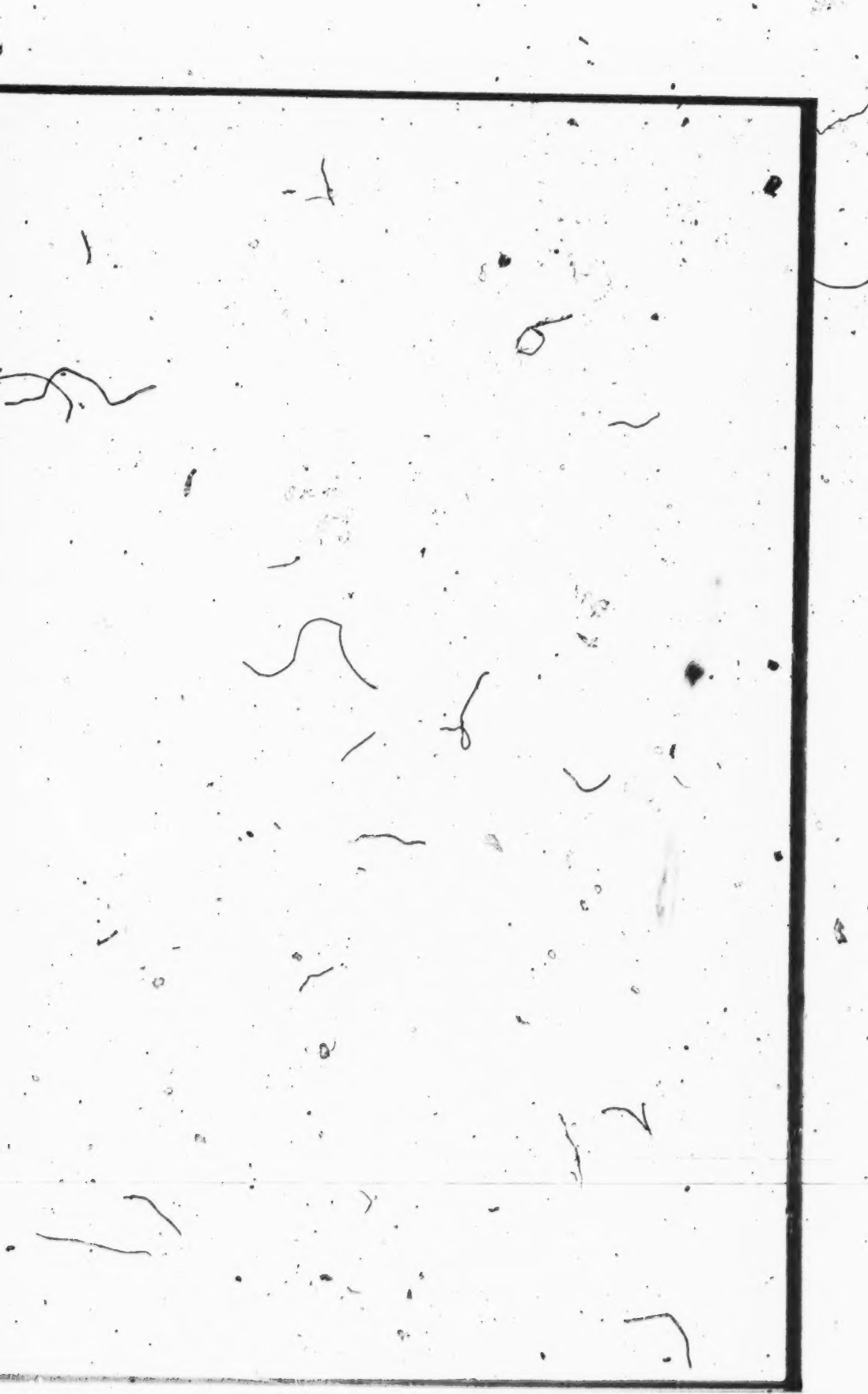
[fol. 85] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 16, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,631. U. S. Circuit Court of Appeals, Second Circuit. Term No. 709. Handy and Harman, petitioner, vs. David Burnet, Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed February 5, 1931. File No. 35,631.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 14

HANDY & HARMAN, PETITIONER,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM C. BREED,
HUGH S. WILLIAMSON,
Counsel for Petitioner.

(35,631)

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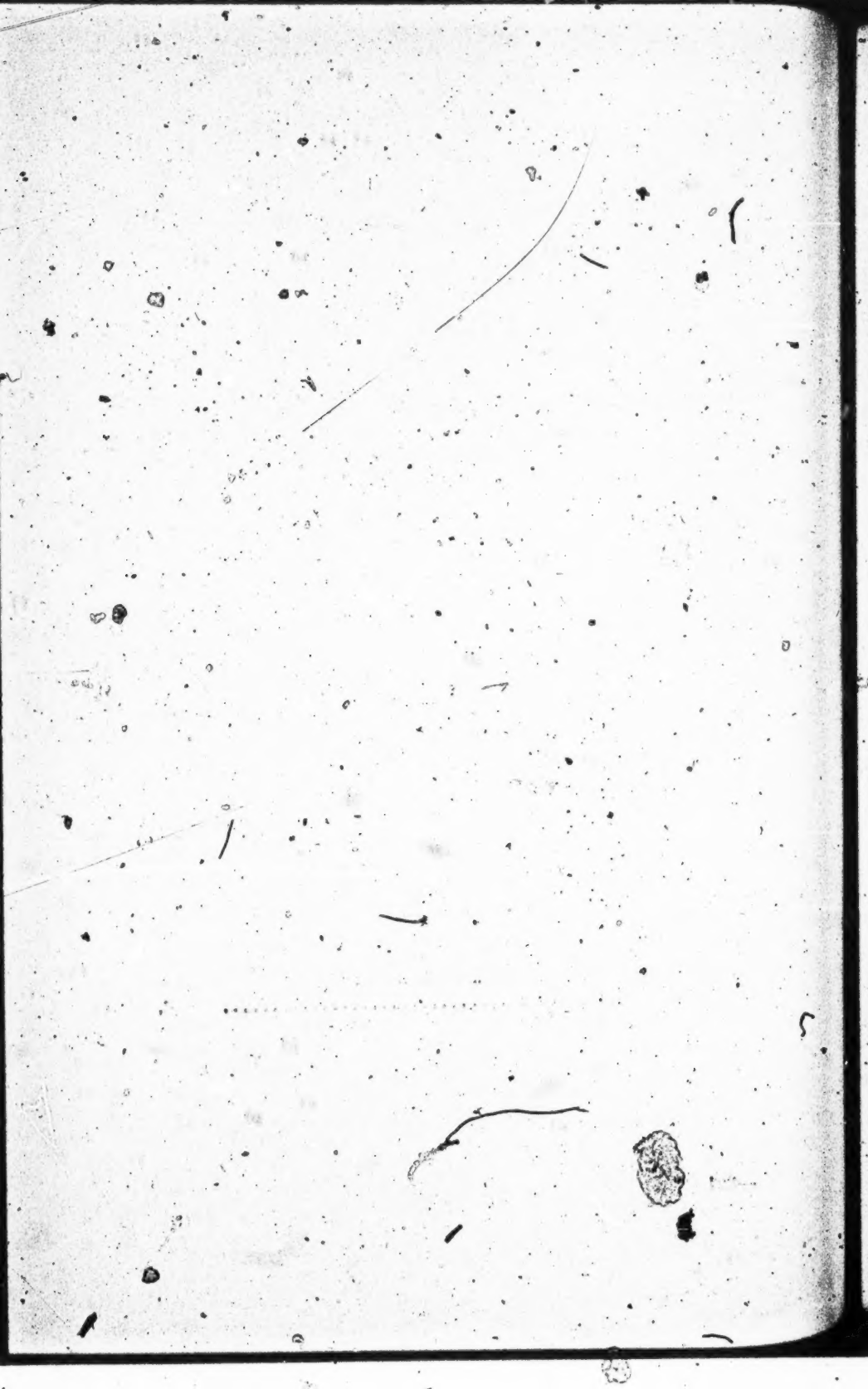

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 709

HANDY & HARMAN, PETITIONER,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION.

Handy & Harman respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled case on January 12, 1931, affirming the decision of the United States Board of Tax Appeals.

Question Involved.

(*a*) In general, were Handy & Harman and Hamilton & De Loss, Inc., affiliated corporations within the meaning of Section 240 of the Revenue Act of 1918 and entitled to make consolidated returns of net income and invested capital for the period January 1, 1918, to February 1, 1919?

(*b*) Specifically, does the word "controlled" used in the statute with reference to stock mean something different from "owned" and, if so, must it be "at least a control legally enforceable" or is *actual* control sufficient?

Statement.

The petitioner, Handy & Harman, claimed the right to file consolidated returns of net income and invested capital with Hamilton & De Loss, Inc., for the year 1918 and the period January 1 to February 1, 1919, upon the ground that the two corporations were affiliated within the meaning of Section 240 of the Revenue Act of 1918.

The Commissioner of Internal Revenue denied this claim, rejected petitioner's claims for abatement for 1918 amounting to $25,800.99 and asserted a deficiency for 1919 of $3,156.90 (R. 1[illegible]). The United States Board of Tax Appeals approved the aforesaid determination of the Commissioner and held the two corporations to be not affiliated (R. 26-38). Upon petition for review the United States Circuit Court of Appeals

for the Second Circuit affirmed the decision of the Board of Tax Appeals (R. 79).

The whole controversy turns upon the question of whether or not 20 per cent of the stock of Hamilton & De Loss, Inc., originally issued to and standing in the name of Harold H. Hamilton on the books of that corporation was "controlled" within the meaning of the statute by the six men who owned practically all of the remaining stock of Hamilton & De Loss, Inc., and who also admittedly owned or controlled substantially all of the stock of Handy & Harman.

The issue arises under the subdivision of the statute providing that corporations shall be deemed affiliated "if substantially all of the stock of two or more corporations is *owned* or *controlled* by the same interests."

The decisions of the various Circuit Courts of Appeals show that two well defined and conflicting theories have been developed with respect to the meaning of the word "controlled":

(1) The Second Circuit Court of Appeals adheres to the theory that the words "owned" and "controlled" are practically synonymous and that to meet the requirements of the statute the minority stock must be controlled *through legally enforceable means.*

(2) Five of the other Circuit Courts of Appeals have placed a different construction upon the statute and hold that where the corporations are operating as a business and economic unit

actual control of the voting stock of the minority is sufficient whether or not based on legally enforceable means.

It has never been questioned that Handy & Harman and Hamilton & De Loss, Inc., were operated as a business and economic unit, and the Circuit Court of Appeals concedes that if the view be accepted that control means *actual* control of the voting power of the minority stock, whether or not legally enforceable, it can scarcely be doubted that the statutory requirements with respect to the ownership or control of stock necessary for affiliation have been met.

Statute Involved.

Revenue Act of 1918, c. 18, 40 Stat. 1067:

> SECTION 240(*a*). That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title and title III, and the taxes thereunder shall be computed and determined upon the basis of such return: * * *
>
> (*b*) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated, * * *.
>
> (2) If substantially all the stock of two or more corporations is *owned* or *controlled* by the same interests.

Reasons for Granting Petition.

A. *Conflict with Other Decisions.*

The decision of the Second Circuit Court of Appeals in this case is directly in conflict with decisions of the Circuit Courts of Appeals in the following cases:

Kile & Morgan Co. *v.* Commissioner, 41 F. (2d) 925 (C. C. A. 1);

J. Rogers Flannery *v.* Commissioner, 42 F. (2d) 11 (C. C. A. 3);

Pelican Ice Co. *v.* Commissioner, 37 F. (2d) 285 (C. C. A. 5);

Great Lakes Hotel Co. *v.* Commissioner, 30 F. (2d) 1 (C. C. A. 7);

Commissioner *v.* Richfield Oil Co., 42 F. (2d) 360 (C. C. A. 9).

The decision of the Circuit Court of Appeals in the instant case is also in conflict with the following decisions of the United States Court of Claims:

Eby Shoe Co., Inc., *v.* United States, 44 F. (2d) 273;

Ullman Manufacturing Co. *v.* United States, 67 Ct. Cls. 104.

B. *General Importance of the Questions.*

Petitioner has been informed and believes that numerous cases involving the application of the 1918 statutory provisions for consolidated returns and the similar provisions of later acts are still pending before the Bureau of Internal Revenue, the Board of Tax Appeals, and in the courts.

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

HANDY & HARMAN,
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HUGH S. WILLIAMSON,
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BREED, ABBOTT & MORGAN,
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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Board of Tax Appeals (R. 26-38) is reported in 17 B. T. A. 980.

The opinion of the Circuit Court of Appeals has not been reported, but appears in the Record, pages 75-79.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 12, 1931. Jurisdiction to issue the writ is found in the provisions of Section 240(*a*) of the Judicial Code as amended by the Act of February 13, 1925.

Statute Involved.

The material portions of Section 240 of the Revenue Act of 1918 are set forth in the petition for certiorari.

The Facts.

There is no dispute as to the facts in the instant case and in substance they are as follows:

Handy & Harman is a New York corporation with its principal office in New York City and is engaged in dealing in gold and silver bullion (R. 27). In 1916 Hamilton & De Loss, Inc., a Connecticut corporation, was caused to be organized by the officers and ma-

jority shareholders of Handy & Harman to take over a department of the latter's silversmithing business (R. 28, 29). At all times during the taxable periods involved six men, Messrs. Parker W. Handy, John L. Harman, Harry H. De Loss, William B. Sewell, George C. Gerrish and Robert H. Leach owned outright 93.71 per cent of the capital stock of Handy & Harman, the remaining shares being owned by employees and most of said shares being held subject to the corporation's option to repurchase should the shareholders leave its employ. The same six men also owned 76.66 per cent of the stock of Hamilton & De Loss, Inc., while 20 per cent of the stock of this corporation stood in the name of Harold H. Hamilton, who was not a stockholder in Handy & Harman (R. 29, 30).

At the time f the organization of Hamilton & De Loss, Inc., Hamilton, a man of large experience in silversmithing, had been invited to become president of the new corporation (R. 28). Hamilton, however, had no money to purchase stock in the new corporation and the purchase price of the 20 per cent interest standing in his name was financed through arrangements made by De Loss whereby Hamilton borrowed the necessary money from a bank upon his notes endorsed by De Loss (R. 30). Prior to the beginning of the taxable periods here in question Hamilton executed an "irrevocable stock power" assigning his stock in Hamilton & De Loss, Inc., to one Robert M. Higgins (R. 64, 65), who subsequently executed a similar instrument assigning the stock to De Loss (R. 62, 63), who deposited it with the bank as collateral security

for the notes. Hamilton never paid anything upon the notes. In 1919 he became insolvent and on February 1, 1919, De Loss paid the notes and took over the stock (R. 30). Prior to the last-mentioned date Hamilton attended all stockholders' meetings of Hamilton & De Loss, Inc., but never voted in opposition to the men who owned the majority stock of both corporations. Hamilton received a salary from Hamilton & De Loss, Inc., but its other officers and directors were also officers or employees of Handy & Harman and received their compensation solely from the latter corporation, even though all or a large part of their working hours were devoted to the former (R. 30, 31).

The plants of both corporations here involved were located in Bridgeport, Connecticut, within 150 yards of each other, and the two corporations were operated as a business and economic unit. In 1918 Hamilton & De Loss, Inc., entered into a contract with the United States Government for the making of eye pieces for gas masks. While this contract was taken in the name of Hamilton & De Loss, Inc., the petitioner financed the contract, melted and rolled the metal and furnished it to Hamilton & De Loss, Inc., which stamped out the eye pieces and returned it to the petitioner for remelting. The entire contract was performed in that manner, neither plant being equipped to do the work independently of the other. Neither the petitioner nor Hamilton & De Loss, Inc., made any profit from the eye-piece contract. Hamilton & De Loss, Inc., sustained a net loss in the year 1918 and during the month of January, 1919 (R. 30-33).

Specifications of Error.

The Circuit Court of Appeals erred in holding:

(1) That the control of stock referred to in the statute must be based on legally enforceable means.

(2) That Handy & Harman and Hamilton & De Loss, Inc., were not affiliated corporations and not entitled to make consolidated returns of net income and invested capital.

ARGUMENT.

I.

The question presented by the instant case is to what extent, if any, the word "controlled" is broader than the word "owned" and arises under the subdivision of the statute providing that corporations shall be deemed affiliated "if substantially all of the stock of two or more corporations is *owned* or *controlled* by the same interests."

The Second Circuit Court of Appeals has adopted a narrow construction of the statute and holds that if control means something different from ownership "it must at least be a control legally enforceable." Under this construction the word "control" becomes practically synonymous with the word "ownership".

Other Circuit Courts of Appeals have placed a different construction upon the statute and have held that when the corporations are operating as a business unit *actual* control of the voting power of the minority stock

is sufficient whether or not based upon legally enforceable means. This conflict between the Circuit Courts of Appeals is clearly recognized and definitely set out in the opinion of the Second Circuit Court of Appeals in the instant case, as follows:

> "In United States *v.* Cleveland P. & E. R. Co., 42 F. (2d) 413 (C. C. A. 6), Judge Mack thoroughly reviewed the legislative history of the statute in question and the judicial decisions which have construed it.
>
> His opinion demonstrates that the courts are not in accord as to the meaning to be given to the word 'control' in determining whether or not affiliation exists. One line of cases holds that when the corporations are operating as a business unit, actual control of the voting power of the minority stock is sufficient, though based on revocable proxies, relationships of blood or friendship, or perhaps even mere acquiescence of the minority. To the authorities cited by Judge Mack as upholding this view may be added the later cases of Kile & Morgan Co. *v.* Commissioner, 41 F. (2d) 925 (C. C. A. 1); J. Rogers Flannery & Co. *v.* Commissioner, 42 F. (2d) 11 (C. C. A. 3); Commissioner *v.* Richfield Oil Co., 42 F. (2d) 360 (C. C. A. 9); Eby Shoe Co., Inc., *v.* United States, 44 F. (2d) 273 (Ct. Cl.). If this view be accepted it can scarcely be doubted that Hamilton's stock was 'controlled' by De Loss and his associates.
>
> The other line of cases adopts a narrower interpretation, and holds that if 'control' means something different from ownership of stock, it must at least be a control legally enforceable. See authorities cited in United States *v.* Cleve-

land P. & E. R. Co., *supra*. *This court is already committed to the narrower view, Commissioner v. Adolph Hirsch & Co., supra; and we are disposed to adhere to it until an authoritative voice declares it wrong.*" (Italics ours.)

The conflict between the Circuit Courts of Appeals with respect to the meaning of the word "controlled" is recognized and stated in *United States* v. *Cleveland, Painesville & Eastern Railroad Co., Inc.*, 42 F. (2d) 413, 417 (C. C. A. 6):

> "(*a*) Some five cases may be disregarded since the facts clearly revealed either complete legal ownership of voting stock, or complete lack of ownership and/or control. The remaining decisions fall roughly into two classes, those holding that ownership and control are practically synonymous and that affiliation can exist only where substantially the entire beneficial interest in the stock is in the hands of the same individuals or corporations, or one corporation owns substantially all the stock of another, and those holding that actual control of an economic business unit, obtained through stock control based on acquiescense, blood relation, or proxy, is sufficient."

The Second Circuit Court of Appeals recognizes that if the broader interpretation of the statute be accepted "it can scarcely be doubted that Hamilton's stock was 'controlled' by De Loss and his associates." In other words, under the decision in the instant case denying to petitioner the right to file consolidated returns of net income and invested capital with Hamilton & De

Loss, Inc., petitioner is compelled to pay substantially larger taxes than other taxpayers similarly situated but located in any of said other five circuits.

II.

Numerous cases involving the application of the 1918 statutory provisions for consolidated returns are still pending before the Bureau of Internal Revenue, the Board of Tax Appeals, and the various Federal courts. The Revenue Acts of 1921, 1924 and 1926 contain consolidated returns' provisions under which questions almost identical with that of the instant case have arisen.

In *United States* v. *Cleveland, Painesville & Eastern Railroad Co., Inc., supra,* Judge Mack, at page 414, said the following with respect to the importance of the question here presented:

> "(1) Few provisions in any of the income tax statutes enacted since the ratification of the Sixteenth Amendment have required a greater amount of litigation and judicial labor for their clarification than those relating to 'invested capital' * * * and those attempting to define 'corporate affiliation' in the Act of 1918 and later statutes."

No decision has been rendered by this Court upon the subject here involved, and it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted in order that the

conflict among the decisions of the Circuit Courts of Appeals be settled and a final rule be established for the guidance of taxpayers, the courts and the Treasury Department.

Respectfully submitted,

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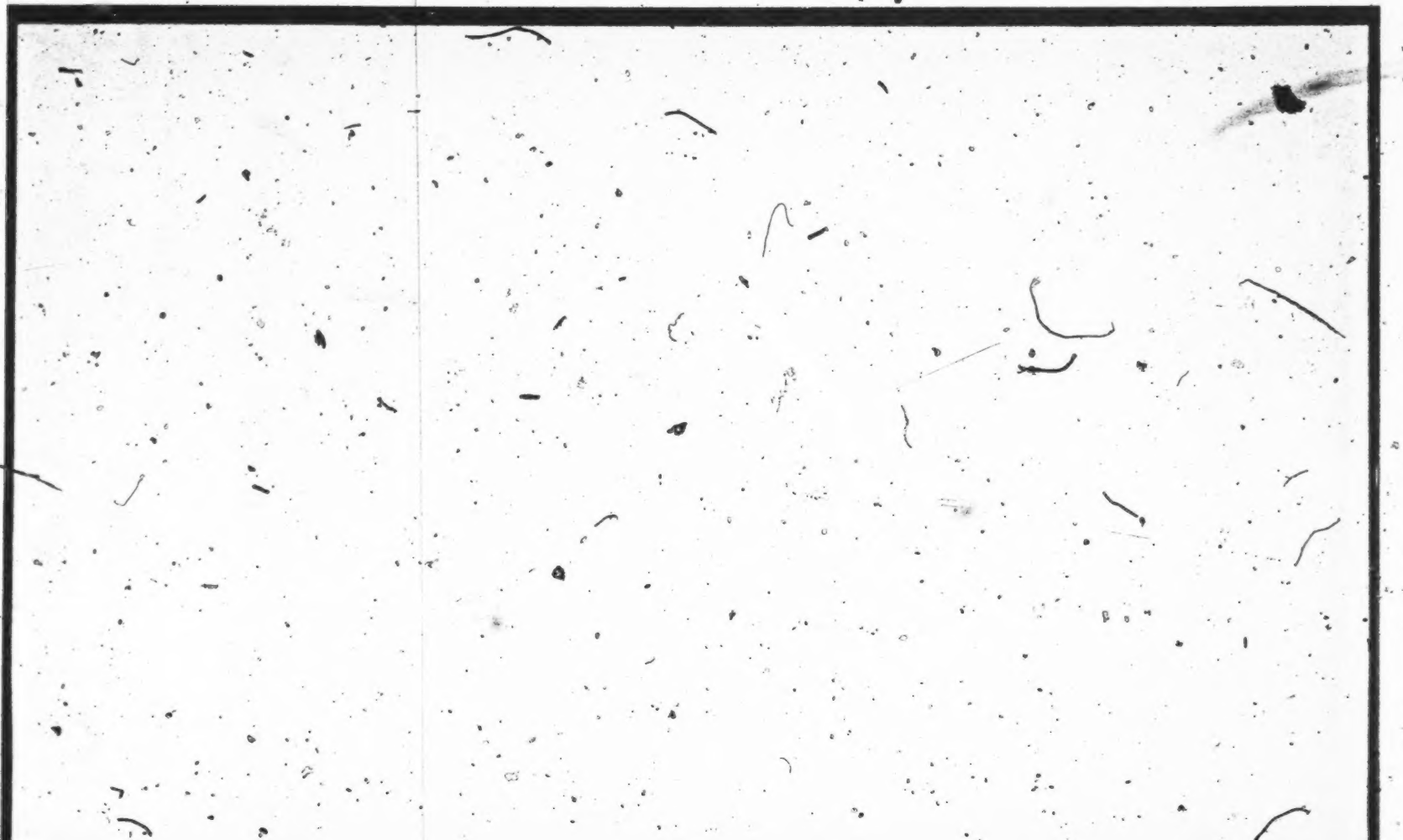

FILE COPY

Supreme Court of the United States

October Term, 1938.

No. 702. 14

HANDY & HARMAN,

Petitioner,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

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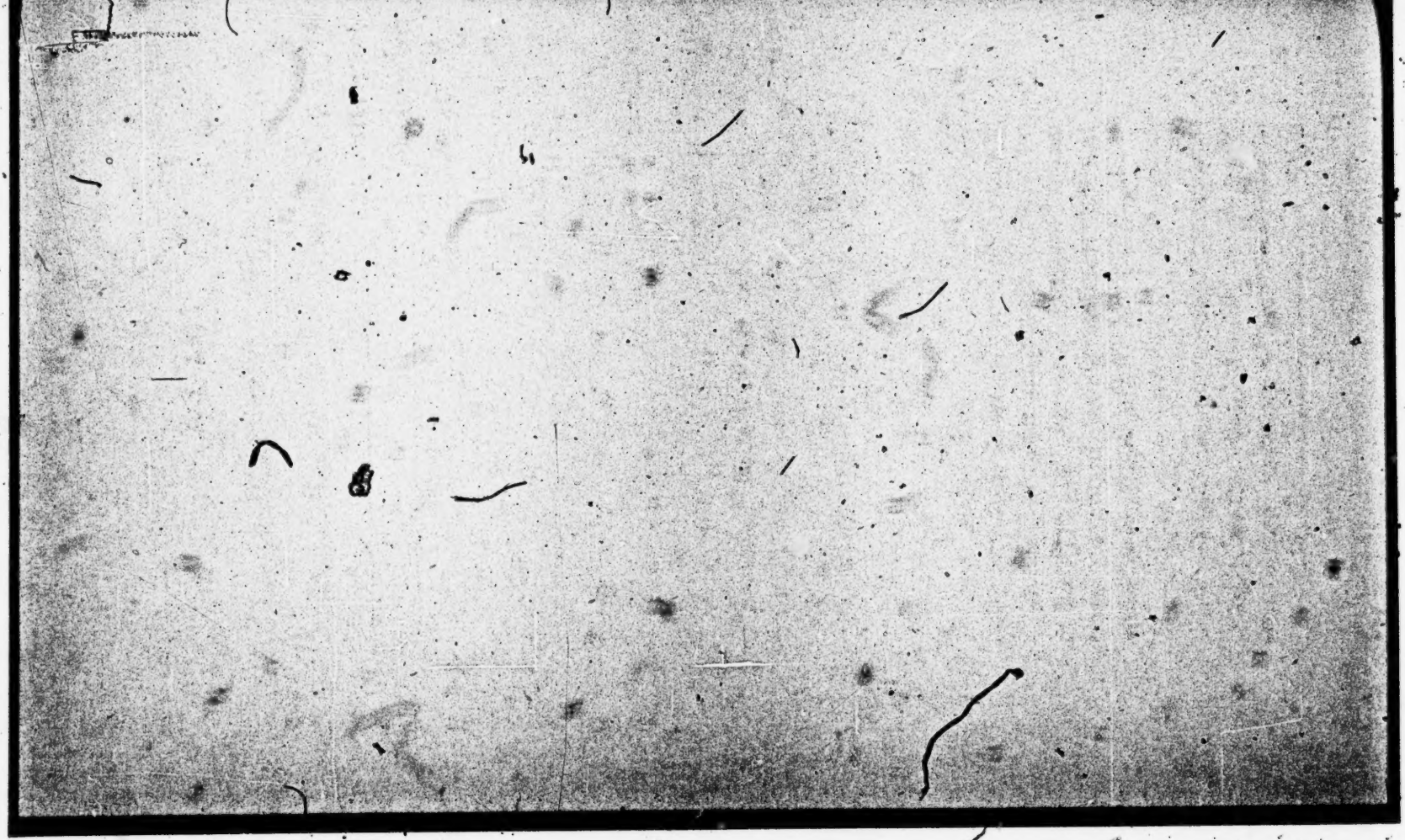

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 709.

HANDY & HARMAN, Petitioner,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, Respondent.

BRIEF FOR PETITIONER.

Previous Opinions.

The previous opinions in this case are those of the United States Board of Tax Appeals, 17 B. T. A. 980, and the United States Circuit Court of Appeals for the Second Circuit (R. 45-49).

Jurisdiction.

This case involves income and profits taxes for the calendar year 1918 in the amount of $79,919.93 and for the year 1919 in the amount of $3,156.90 (R. 6, 12). The case comes before this court on writ of certiorari issued March 16, 1930, to review the decision of the United States Circuit Court of Appeals for the Second Circuit (R. 50).

Statement.

The petitioner, Handy & Harman, claimed the right to file consolidated returns of net income and invested capital with Hamilton & DeLoss, Inc., for the year 1918 and the period January 1 to February 1, 1919, upon the ground that the two corporations were affiliated within the meaning of Section 240 of the Revenue Act of 1918.

In 1920 the then Commissioner of Internal Revenue ruled that the two companies were so affiliated and accepted the consolidated returns. Subsequently in 1924 Commissioner Blair reversed the ruling of his predecessor, held the two companies not affiliated, rejected petitioner's claims for abatement for 1918, and asserted a deficiency for 1919 (R. 21). The United States Board of Tax Appeals approved the determination of the Commissioner (R. 16-24). Upon petition for review the United States Circuit Court of Appeals for the Second Circuit affirmed the decision of the Board of Tax Appeals (R. 45-49).

Handy & Harman, a New York corporation, was organized in 1905 and succeeded to the business of the partnership of Handy & Harman which for many years had been engaged in dealing in gold and silver bullion and specie. The petitioner has its principal office in New York City and its factory is located at Bridgeport, Connecticut (R. 17).

Prior to 1906 the petitioner and the partnership had been supplying the silversmith trade with silver rolled into sheets and coils, but about that time the petitioner began the practice of cutting the silver into flat circles and rectangles, thereby effecting certain economies in investment and operation. About 1912 or 1913 the officers of petitioner conceived the idea of not only stamping out the flat circles and rectangles but of partially shaping them, thereby effect-

ing further economies to themselves and to the trade. This operation would have required the installation of additional machinery by the petitioner and the question of whether this work should be handled by the petitioner or by a separate corporation was discussed and considered by the officers of petitioner for several years. Finally it was decided to form a new corporation for that purpose. Accordingly, on December 23, 1916, the new corporation, Hamilton & DeLoss, Inc., was organized under the laws of Connecticut. It was the intention of the officers of both corporations that Handy & Harman should continue to mill and roll the silver, but that Hamilton & DeLoss, Inc., should take over all of the stamping department operations (R. 17-18).

Hamilton & DeLoss, Inc., erected a plant in Bridgeport within 150 yards of the plant of Handy & Harman, and silver production machinery costing $47,000 was installed. However, because of war conditions, work was slow and at the end of January, 1918, the output of the plant had been small, the total sales amounting to approximately $6,000 (R. 19).

At the beginning of the year 1918 the silver business had declined greatly and it was difficult to obtain labor and raw material. Furthermore, the officers were apprehensive that both corporations, being classified as non-essential industries, would be taken over by the Government and disorganized. After considerable discussion among the officers and directors of both corporations it was decided that Hamilton & DeLoss, Inc., should not continue for the present with the silver stamping business for which it had been organized and equipped. In order to continue the plant in operation it became necessary to secure contracts from the Government. The petitioner also secured some

Government contracts which were of benefit in placing it among the essential industries of the country (R. 19-20).

In 1918 an officer connected with the Gas Mask Division of the United States Army called on Mr. DeLoss at the plant of Handy & Harman in Bridgeport to ascertain whether that plant could mill brass for making eye-pieces for gas masks and in addition stamp out the eye-pieces. DeLoss informed him that since the plant of Handy & Harman was not equipped to stamp out the eye-pieces, the entire work could not be done by petitioner alone, but that the work could be done by utilizing the plants of both Handy & Harman and Hamilton & DeLoss, Inc. The question of accepting this contract was discussed among the officers and directors of the two corporations, and it was finally decided to take the contract. Since the billing work could be more conveniently handled through the offices of Hamilton & DeLoss, Inc., the contract was actually taken in the name of that corporation. The petitioner, however, financed the contract, and as in its silver business milled and rolled the metal and furnished it to Hamilton & DeLoss, Inc., which stamped out the eye-pieces and returned the scrap metal to petitioner for remelting. The entire work was performed in that manner, neither plant being equipped to do the work independently of the other. Neither the petitioner nor Hamilton & DeLoss, Inc., made any profit from the eye-piece contract. Hamilton & DeLoss, Inc., sustained a net loss in the year 1918 and during the month of January, 1919 (R. 20-21).

Prior to the organization of Hamilton & DeLoss, Inc., Harry H. DeLoss, vice-president of the petitioner, had discussed the question of the formation of such corporation at great length with Harold H. Hamilton, who had had many years experience in the silversmithing business, and

when it was finally decided to form a new corporation Hamilton was invited to become its head (R. 18). However, he had no money with which to purchase stock therein and the stock originally issued in his name was financed through arrangements made by DeLoss whereby the necessary money was borrowed from a bank upon notes endorsed by DeLoss (R. 19). Prior to the beginning of the taxable periods in question Hamilton executed an "irrevocable stock power" assigning his stock in Hamilton & DeLoss, Inc., to one Robert M. Higgins (R. 38), who, nine days after the beginning of the taxable period, executed a similar instrument assigning and transferring the stock to DeLoss (R. 37), who deposited it with the bank as collateral security for the notes. Hamilton never paid anything upon the notes. In 1919 he became insolvent and on February 1, 1919, DeLoss paid the notes and the stock was returned to him by the bank. Prior to the last mentioned date Hamilton attended all stockholders' meetings of Hamilton & DeLoss, Inc., but never voted in opposition to the men who owned the majority stock of both corporations (R. 19).

Hamilton received a salary of about $10,000 a year from Hamilton & DeLoss, Inc. However, its other officers and directors, who were also officers, directors or employees of Handy & Harman, received their compensation solely from the latter corporation although all or a large part of their working hours were devoted to the business of Hamilton & DeLoss, Inc. (R. 19).

At all times during the taxable periods involved six men, Messrs. Parker D. Handy, John L. Harman, Harry H. DeLoss, William B. Sewell, George C. Gerrish and Robert H. Leach owned outright 93.71 per cent of the capital stock of Handy & Harman, the remaining shares being owned by employees and most of said shares held subject to the con-

poration's option to repurchase should the shareholders leave its employ. The same six men also owned 76.66 per cent of the stock of Hamilton & DeLoss, Inc., while 20 per cent of its stock was originally issued to Harold H. Hamilton, and later assigned and delivered to DeLoss as stated above (R. 18-19).

The issue arises under the subdivision of Section 240(b) of the Revenue Act of 1918 providing that corporations shall be deemed affiliated "if substantially" all of the stock of two or more corporations is *owned or controlled* by the same interests."

The Circuit Court denied to petitioner the right to file affiliated returns with Hamilton & DeLoss, Inc., upon the grounds that although DeLoss and his associates exercised *actual* control over the stock originally issued to Hamilton, this control was not based upon legally enforceable means, and therefore the requirements of the statute had not been met (R. 48-49).

Specification of Errors.

The Circuit Court of Appeals erred in holding:

1. That the control of stock referred to in the statute means a control based upon legally enforceable means and not control in fact or actual control.

2. That Handy & Harman and Hamilton & DeLoss, Inc., were not affiliated corporations and not entitled to make consolidated returns of net income and invested capital for the period January 1, 1918 to February 1, 1919.

ARGUMENT.

I.

The requirements for affiliation contained in Section 240(b) of the Revenue Act of 1918 are met if substantially all the stock of two or more corporations is owned or *actually* controlled by the same interests, whether or not such control is based upon legally enforceable means.

The petitioner's claim for affiliation with Hamilton & DeLoss, Inc., arises under Section 240 of the Revenue Act of 1918 (40 Stat. 1057).

The pertinent provisions of the law are as follows:

> "Sec. 240 (a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return:
>
> * * * * * *
>
> (b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated * * * (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

This case comes before the court by reason of a conflict between the Circuit Courts of Appeals with respect to the meaning to be given to the word "controlled" as used in Section 240(b), *supra*.

The court below has adopted the narrow view of the statute and has held:

> "That if 'control' means something different from ownership of stock, it must at least be a control legally enforceable" (R. 48).

This view is opposed to the construction placed upon the word "controlled" by the Circuit Courts of Appeals of five other circuits.

Petitioner contends that the interpretation adopted by the Second Circuit is erroneous, and that where two or more corporations are operating as a business and economic unit, *actual* control of the stock of the minority is sufficient whether or not based upon legally enforceable means. The decisions sustaining this view are as follows:

Kile & Morgan Co. *v.* Commissioner, 41 F. (2d) 925, C. C. A. 1;

J. Rogers Flannery & Co. *v.* Commissioner, 42 F. (2d) 11, C. C. A. 3;

Pelican Ice Co. *v.* Commissioner, 37 F. (2d) 285, C. C. A. 5;

Great Lakes Hotel Co. *v.* Commissioner, 30 F. (2d) 1, C. C. A. 7;

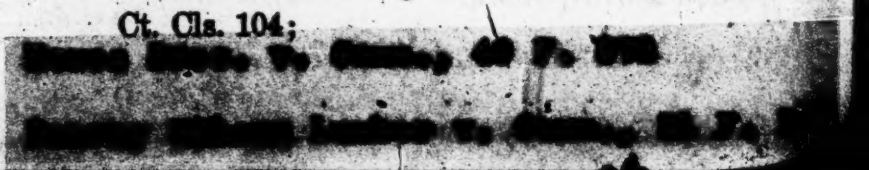
Commissioner *v.* Wilshire Oil Company, Inc., C. C. A. 9, decided Feb. 9, 1931;

Commissioner *v.* Richfield Oil Co., 42 F. (2d) 360, C. C. A. 9;

Mahoning Coal Railroad Co. *v.* U. S., 41 Fed. (2d) 533;

Eby Shoe Co., Inc. *v.* United States, 44 F. (2d) 273 (Ct. Cls.);

Ullman Manufacturing Co. *v.* United States, 67 Ct. Cls. 104;



Appeal of Hagerstown Shoe and Legging Co., 1 B. T. A. 666;
Appeal of Isse Koch & Co., Inc., 1 B. T. A. 624.

In the case before this court it has never been questioned that petitioner and Hamilton & DeLoss, Inc., were a business and economic unit and were operated as such. Upon its organization in 1916 Hamilton & DeLoss, Inc., took over the stamping department of the petitioner's business. Its plant was erected adjacent to the plant of petitioner, and, except for Hamilton, the officers and directors of the two corporations were the same. Their salaries, however, were paid entirely by petitioner. After the organization of Hamilton & DeLoss, Inc., the petitioner continued to finance the purchase of materials and to melt and roll the silver into sheets which were then turned over to Hamilton & DeLoss, Inc., to be stamped into the desired shapes. The gas mask contract which was secured in 1918 was taken in the name of Hamilton & DeLoss, Inc., merely for greater convenience in handling the bookkeeping. In performing this contract, as in its silver business, petitioner purchased the materials, melted and rolled the brass for the eye pieces, and furnished it to Hamilton & DeLoss, Inc., for stamping. Neither corporation was equipped to function without the aid of the other (R. 17-21).

Furthermore, six men owned or controlled substantially all of the stock of both corporations. Parker D. Handy, John F. Harman, Harry H. DeLoss, William B. Sewell, George C. Gerrish and Robert H. Leach together owned 93.71% of the stock of petitioner and controlled the remaining shares which were owned by employees and subject to petitioner's option to repurchase should the shareholder leave its employ. The same six men also

owned 76.66% of the stock of Hamilton & DeLoss, Inc. An additional 20% of the stock of this corporation stood in the name of H. H. Hamilton, who was not a stockholder in Handy & Harman. However, it is clear that the position of Hamilton was not that of an ordinary stockholder. He was merely an employee whose employment was at the will of the majority stockholders and not for a term. At no time during the taxable period did he have legal title to or possession of the stock standing in his name (R. 37-8). He was a man without means or credit and never had any capital invested in and subject to the risks of the enterprise (R. 19). The continued existence of harmonious relations between himself and the majority was imperative if he was to retain even the possibility of becoming a stockholder. Under such circumstances it is submitted that the majority stockholders completely dominated and controlled the voting power of the so-called Hamilton stock. Their control was such as to render it impotent and negligible as a possible adverse interest.

The court below conceded the existence of this actual control over the Hamilton stock but denied affiliation on the ground that the statute required a control based upon legally enforceable means. This interpretation is erroneous because it fails to apply the accepted meaning of the words of the statute and thus give effect to the intent of Congress.

The word "controlled" as it appears in the statute is unqualified. It is defined in Webster's International Dictionary as meaning: "To exercise restraining or directing influence over; to dominate; regulate; hence to hold from action; to curb, subject, overpower." In Funk & Wagnalls New Standard Dictionary it is defined as meaning "to exercise a direct, restraining or governing influence".

The word "owned" is not synonymous with "controlled", but is defined by Webster as meaning "to possess, to have a rightful title to, whether legal or natural".

As pointed out in the cases cited above:

> "Even though the word 'control', as used in the statute is interpreted to mean stock control, it was clearly not intended to be synonymous with stock ownership. If it were otherwise there would have been no purpose in using the words 'owned or controlled' in the statute" *Mahoning Coal Railroad Co.* v. *U. S., supra* (41 Fed. (2d) 533, 536).

However, the court below, in restricting the word "controlled" to a control based upon legally enforceable means, refused to give to the word its accepted meaning and made it practically synonymous with the word "owned".

Such a construction cannot be justified since "* * * statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributed to them". *DeGanay* v. *Lederer*, 250 U. S. 376, 381. The Legislature is presumed to have used no superfluous words, and every word of a statute must be accorded a meaning. *Platt* v. *Union Pacific Railroad Company*, 99 U. S. 48, 58-59. In construing taxing statutes it is most important that the words employed be given their literal meaning. *United States* v. *Merriam*, 263 U. S. 179, 187. Or as the rule is sometimes stated:

> "* * * the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."
>
> Lynch *v.* Alworth-Stephen Co., 267 U. S. 364, 370.

The interpretation of the court below violates all of these well-settled principles, while that urged by petitioner accepts and applies them. It is obvious that if these principles are applied and the words given their literal meaning, "control of stock" is something very different from "ownership of stock" and that the word "controlled" means *actual* control, whether or not based upon legally enforceable means.

Furthermore, the legislative history of the Act furnishes abundant evidence that Congress used these words in their broad and natural sense.

The first provision requiring or permitting the filing of consolidated returns was contained in Articles 77 and 78 of Treasury Regulations 41 issued by the Commissioner pursuant to the War Revenue Act of October 3, 1917 (40 Stat., 300). Article 77 provided in part as follows:

> "For the purpose of this regulation two or more corporations will be deemed to be affiliated (1) when one such corporation owns directly or controls through closely affiliated interests or by a nominee or nominees, all or substantially all of the stock of the other or others, or when substantially all of the stock of two or more corporations is *owned* by the same individual or partnership, and both or all of such corporations are engaged in the same or a closely related business; or (2) when one such corporation (a) buys from or sells to another products or services at prices above or below the current market, thus effecting an artificial distribution of profits, or (b) in any way so arranges its financial relationships with another corporation as to assign to it a disproportionate share of net income or invested capital."

In subdivision 1 of the above article affiliation was deemed to exist "when substantially all of the stock of two or more corporations is *owned* by the same individual or partnership, and both or all of such corporations are engaged in the same or a closely related business."

When H. R. 12863, which later became the Revenue Act of 1918, was under consideration in Congress, the Senate Finance Committee said the following in its report to the Senate with respect to the subject of affiliation:

> "Provision has been made in Sec. 240 for a consolidated return, in the case of affiliated corporations, for purposes both of income and profits taxes. A year's trial of the consolidated return under the existing law demonstrated the advisability of conferring upon the Commissioner explicit authority to require such returns.
>
> "So far as its immediate effect is concerned consolidation increases the tax in some cases and reduces it in other cases, but its general and permanent effect is to prevent evasions which can not be blocked in any other way. Moreover, a law which contains no requirements for consolidation, puts an almost irresistible premium on a segregation or a separate incorporation of activities which would normally be carried as branches of one concern. Increasing evidence has come to light demonstrating that the possibilities of evading taxation in these and allied ways are becoming familiar to the taxpayers of the country. While the committee is convinced that the consolidated return tends to conserve, not to reduce, the revenue, the committee recommends its adoption not primarily because it operates to prevent evasion of taxes or because of its effect upon the revenue, but because *the principle of taxing as a business unit is sound and equi-*

table and convenient both to the taxpayer and to the government." (Italics ours.)

Sen. Rep. 617 to accompany H. R. 12863, December 6, 1918, 65th Cong., Third Sess., pp. 8-9.

It is perfectly clear from the foregoing that in enacting Section 240 of the 1918 Act. Congress intended to make provision for levying the tax in accordance with the true net income and invested capital of an enterprise and to disregard the incidental placing of its different branches in legally separate corporations. The purpose sought to be accomplished was to prevent the evasion of taxes and to prevent a business unit from being subjected to undue taxes.

To make this intent effective, Congress used language in the 1918 Act which is materially broader in its meaning than that contained in the 1917 Regulations. The 1918 Act substituted the words "*owned or controlled*" for the word "*owned*". Under these circumstances it certainly cannot be presumed that Congress deemed the word "controlled" synonymous with the word "owned" or intended that the words "or controlled" should be disregarded or given a strained and unnatural meaning. To the contrary, it must be presumed that Congress, having deliberately substituted the phrase "owned or controlled" for the word "owned", intended that the word "controlled" be given its ordinary meaning. *Platt* vs. *Union Pacific R. R. Co., supra* (99 U. S. 48).

In order to further carry out this broad intent and purpose, Congress substituted the phrase "the same interests" for "the same individual or partnership", and eliminated the requirement that the businesses be the same or closely

related ones. It would be difficult to conceive of words better designed to give effect to the intention of Congress to tax as a business unit what in fact was a business unit.

Respondent has conceded that the language of the statute gives effect to this underlying purpose of Congress. Article 631 of Regulations 45 (1919 edition), issued by respondent under the Revenue Act of 1918, reads in part as follows:

> "Affiliated corporations.—The provision of the statute requiring affiliated corporations to file consolidated returns is based upon the principle of levying the tax according to the true net income and invested capital of a single business enterprise, even though the business is operated through more than one corporation. * * * Otherwise opportunity would be afforded for the evasion of taxation by the shifting of income through price fixing, charges for services and other means by which income could be arbitrarily assigned to one or another unit of the group. In other cases without a consolidated return excessive taxation might be imposed as a result of purely artificial conditions existing between corporations within a controlled group. See articles 785, 791, 802 and 864-869."

This contemporaneous administrative interpretation of the Act is entitled to great weight.

> Swendig *v.* Washington Water Power Company, 265 U. S. 322, 331;
> Brewster *v.* Gage, 280 U. S. 327, 336;
> U. S. *v.* Jackson, 280 U. S. 183, 193.

In the Appeal of *Isse Koch & Co.*, 1 B. T. A. 624, 627, the Board of Tax Appeals construed Section 240 and held as follows:

> "There is no authority in the section of law referred to or in its context, so far as we can see, for assuming that Congress intended to use the word 'control' in other than its ordinary and accepted sense. On the other hand, we believe that a proper construction of the statute, if it is to serve the purpose for which it was intended, requires us to hold that the 'control' mentioned therein means actual control, regardless of whether or not it is based upon legally enforceable means."

Respondent acquiesced in this construction of the statute (Cumulative Bulletin, IV-I, p. 2).

Here, actual control of the Hamilton stock is conceded, but respondent now seeks to limit and restrict the natural meaning of the word "controlled" and deny petitioner the right to file consolidated returns with Hamilton & DeLoss, Inc., because the control was not based upon legally enforceable means.

In enacting the affiliation provisions of the 1918 Act, Congress admittedly sought to prevent the evasion of taxes by the arbitrary shifting of income "to one or another unit of the group" and at the same time to permit the tax to be levied upon the true net income of a single enterprise. As interpreted by the court below, the statute would not accomplish either of these purposes. It is submitted that the actual control of the Hamilton stock by the majority stockholders would be as effective for the purpose of the arbitrary shifting of income as a control based upon the most formal and legally enforceable instrument. Furthermore, during the taxable periods in question, the two corporations were engaged in a joint enterprise wholly unable to function independently. On the basis of separate returns, petitioner is subjected to an undue tax, for while it made a profit the stamping operations of Hamilton & DeLoss, Inc.,

were conducted at a loss. It is only by combining the operations of the inter-dependent companies in a consolidated return that the true net income and invested capital of the enterprise can be determined and the proper tax levied.

While the Government ought not to be deprived of its revenues through a strained and unnatural construction, it is equally clear the taxpayer should not be deprived thereby of the benefits which would flow to it from an interpretation which not only gives effect to the plain meaning of the words, but to the intent of Congress. The general application of the construction urged by petitioner will prevent the evasion of taxes and at the same time permit the tax to be levied upon the true net income of a single business enterprise.

II.

It is submitted that petitioner and Hamilton & DeLoss, Inc., were affiliated corporations within the meaning of Section 240 of the Revenue Act of 1918 and entitled to file consolidated returns of income and invested capital for the year 1918 and for the period of January 1, 1919 to February 1, 1919, and that the decision of the Circuit Court of Appeals holding the two corporations to be not affiliated for these periods should be reversed.

Respectfully submitted,

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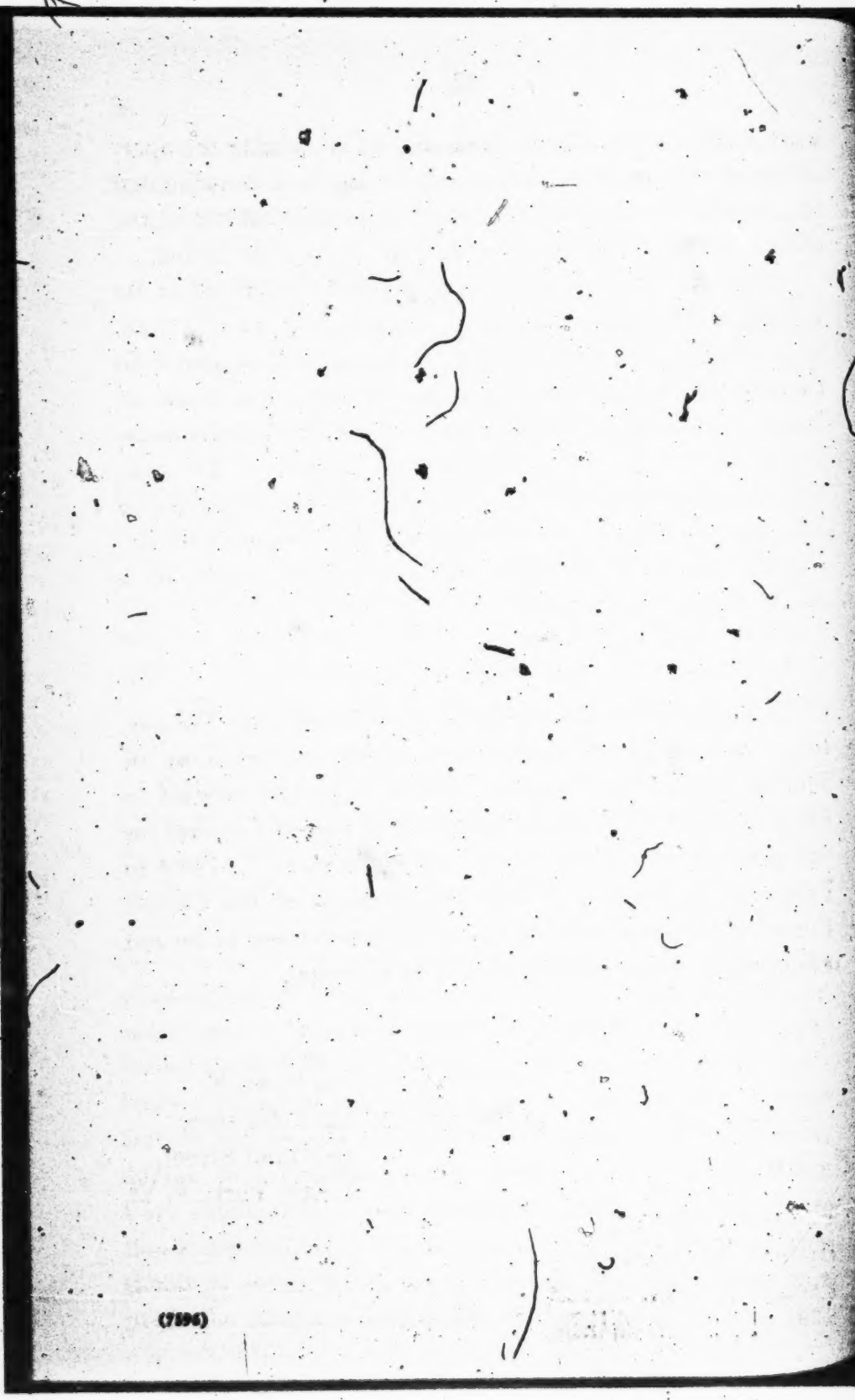

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Supreme Court of the United States

October Term, 1931.

No. 14.

HANDY & HARMAN,
Petitioner,

against

DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

REPLY BRIEF FOR PETITIONER.

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HANDY & HARMAN,
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REPLY BRIEF FOR PETITIONER.

Respondent's brief is devoted to the following propositions:

1. That the stockholders of petitioner did not own "substantially all" of the stock of Hamilton & DeLoss, Inc. (pp. 8, 9).

Petitioner agrees.

2. The statute refers to *stock* control and not to control of the business (p. 9).

Petitioner agrees.

3. Affiliation may not be allowed solely upon the ground that two or more corporations comprise a business and economic unit (pp. 17-28).

Petitioner agrees.

4. Hamilton and the majority stockholders of petitioner did not constitute "the same interests" (pp. 13-17).

Stated in these terms, petitioner also agrees, but in view of the actual control over the Hamilton 20% stock by petitioner's majority stockholders, conceded by the Court below and not disputed by respondent, it inevitably follows that substantially all of the stock of the two corporations was controlled by the same interests.

5. The control contemplated by the statute "must at least be a control legally enforcible" (pp. 10-13).

The fifth proposition brings us to the one question in this case:

Does the word "control" contained in Section 240 of the Revenue Act of 1918, mean *legally enforceable control*, or does it mean *actual control*, to be tested by the facts of each case whether or not legally enforceable?

Respondent concedes that the stockholders of petitioner owned 75.74% to 76.66% of the stock of Hamilton & DeLoss, Inc. (Br., p. 8). If the Hamilton stock (20%) was actually controlled, then "substantially all" of the stock of both Corporations was owned or controlled by "the same interests".

As to the control of the minority or Hamilton stock, the Court below pointed out that "one line of cases holds that when the corporations are operating as a business unit, actual control of the voting power of the minority stock is sufficient" and expressely stated:

> *"If this view be accepted it can scarcely be doubted that Hamilton's stock was 'controlled' by DeLoss and his associates"* (Record, p. 48).

In petitioner's main brief it is asserted that respondent concedes the existence of this actual control (Br., p. 16). This is not challenged but confirmed by respondent in his opening statement of the question presented, which reads as follows (Br., p. 2):

> "Whether two companies may file a consolidated income tax return as affiliated corporations under Section 240 of the Revenue Act of 1918 if the two companies are operating as a business unit and their stock is under the actual but not legally enforcible control of the same interests."

Admitting actual control, respondent's contention is that petitioner must fail because it was not a control based upon legally enforceable means (Br., pp. 6, 10-13). Petitioner contends that affiliation should be allowed by reason of the actual control shown by the facts of this case whether or not it was based upon legally enforceable means.

Discussion of Respondent's Citations.

In support of his various arguments, respondent cites the following District Court decisions (Br., pp. 10, 11):

Goldstein Brothers Amusement Co. *v.* White (Mass.), 33 F. (2d) 787;

Alameda Investment Co. *v.* McLaughlin (N. D. Cal.), 28 F. (2d) 81;

Montana Mercantile Co., *et al. v.* Rasmusson (Mont.), 28 F. (2d) 916.

These cases are no longer authoritative in view of later decisions of the Circuit Court of Appeals for the First and Ninth Circuits, which hold to the contrary.

the Bank rested upon his title thereto under the stock assignment from Hamilton, and we cannot see how the bank could have refused at any time to allow DeLoss to take up the shares, have them registered in his name under the irrevocable stock power, and redeposited with the bank. Certainly the circumstances of this situation are such as to give DeLoss a substantial beneficial interest in and control over the Hamilton stock.

If this Court should find that the Court below was in error in holding that DeLoss did not have the power after deposit, to cause the shares to be registered in his name, then under its own theory it would follow that substantially all of the stock of both corporations was owned or controlled by the same interests.

The Decision of the Court Below is Against the Weight of Authority.

The Second Circuit Court of Appeals is the only Circuit which has held the word "controlled" required a legally enforceable control.

Such a definition does not give effect to the usual and natural meaning of the word "controlled".

Such a definition is contrary to the interpretation placed upon the word "controlled" by the Board of Tax Appeals, in its early decisions which were followed by the Commissioner of Internal Revenue. See *Isse Koch & Co., Inc.* (1 B. T. A., p. 624); Cumulative Bulletin, IV-1, p. 2.

It is submitted that the construction of Section 240 adopted by six Circuit Courts of Appeal, which do not define control to mean only "legally enforceable" control should be

followed by this Court, and the decision of the Second Circuit, the Court below, should be reversed.

Respectfully submitted,

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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1930

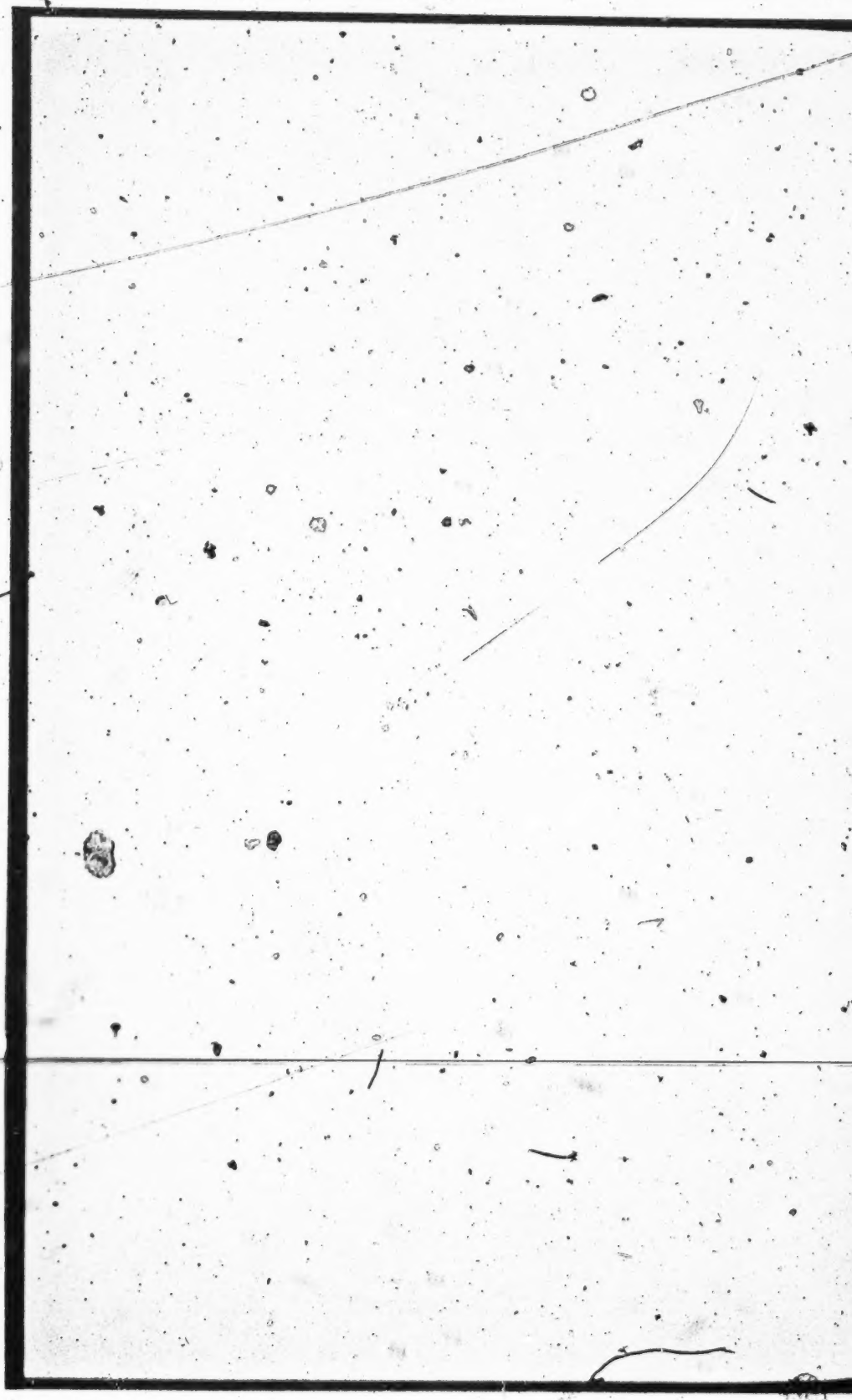
HANDY AND HARMAN, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION



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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 709

HANDY AND HARMAN, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 26–36) is reported in 17 B. T. A. 980. The opinion of the Circuit Court of Appeals (R. 75–79) has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 12, 1931. (R. 79.) The petition for certiorari was filed February 5, 1931. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether two companies may file a consolidated income-tax return as affiliated corporations, under the Revenue Act of 1918, if the two companies are operating as a business unit and their stock is actually controlled by the same interests, even though the control is not legally enforceable.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1081:

> SEC. 240. (a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return: * * *
>
> (b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated, * * * (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.

STATEMENT

The following findings of fact were made by the Board of Tax Appeals (R. 26–33):

Petitioner was a New York corporation, dealing in silver, and engaging in allied activities. (R. 27.) Hamilton and De Loss, Inc., a Connecticut corporation, was organized in 1916 to do the metal stamping for petitioner. (R. 28–29.) Harold H. Hamilton, an expert in the silversmithing business, was chosen president of Hamilton and De Loss, Inc. Six men owned about 94 per cent. of the stock of petitioner. (R. 29.) They also owned about 77 per cent of the stock of Hamilton and DeLoss, Inc., but in different proportions. Hamilton did not own any stock in petitioner but he was to have 20 per cent of the stock of Hamilton and De Loss, Inc., (R. 29–30.) Hamilton did not have the money to pay for the stock, and so Harry H. De Loss, vice president of both petitioner and of Hamilton and De Loss, Inc., and one of the six men mentioned above, arranged a loan to Hamilton, whereby Hamilton paid for the stock and assigned it to De Loss, the latter depositing it as collateral security for the loan. (R. 30.) Hamilton received a salary from Hamilton & De Loss. He attended all stockholders' meetings of Hamilton and De Loss, and voted his stock, but never voted in opposition to the six men owning stock in both companies. (R. 30.)

Hamilton became insolvent in 1919, and on February 1, 1919, DeLoss paid the loan and took over Hamilton's stock. (R. 30.)

Petitioner and Hamilton and DeLoss, Inc., originally filed separate returns for 1918, but subse-

quently filed a consolidated return for that year which was accepted. (R. 33.) In 1924, the then Commissioner of Internal Revenue reversed the ruling of his predecessor in office, and held that the companies were not affiliated, and assessed deficiencies in tax against petitioner of $25,800.99 for 1918. (R. 33.) The Board of Tax Appeals affirmed the ruling. (R. 38.) The Circuit Court of Appeals for the Second Circuit affirmed the judgment of the Board of Tax Appeals. (R. 79.)

The question of affiliation of the two companies after February 1, 1919, when DeLoss took over Hamilton's stock, is not involved.

ARGUMENT

The court below held there was no control within the meaning of the statute, since DeLoss could not legally enforce his control over Hamilton, although an actual control was exerted over Hamilton's stock. (R. 78.) This followed the previous decisions of the same court in *Ice Service Co.* v. *Commissioner*, 30 F. (2d) 230, and *Commissioner* v. *Adolph Hirsch and Co.*, 30 F. (2d) 645. A similar position has been taken by the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Cleveland, P. and E. R. Co., Inc.*, 42 F. (2d) 413; by the Court of Appeals of the District of Columbia in *American Auto Trimming Co.* v. *Lucas*, 37 F. (2d) 801; and by the Court of Claims in *Wadhams and Co.* v. *United States*, 67 C. Cls. 235.

The legislative history of the Revenue Acts shows, as Judge Mack pointed out in *United States v. Cleveland, P. and E. R. Co.*, *supra*, that the control intended was one legally enforceable. The 1918 Act partially incorporated Article 77 of Treasury Department Regulations 41, promulgated under the War Revenue Act of 1917, c. 63, 40 Stat. 300. The part of Article 77 not enacted related to affiliation on the basis of a business or economic unit. This part was in the bill as it left the Senate. 65th Cong., 3d Sess., H. R. 12863, Senate Calendar No. 563. But it was stricken out in conference. H. R. Conference Report No. 1037, 65th Cong., 3d Sess., p. 15, to accompany H. R. 12863. And as changed it became law.

But the Circuit Court of Appeals for the Ninth Circuit has definitely rejected the proposition that the control necessary for affiliation must be legally enforceable. *Burnet v. Wilshire Oil Co., Inc.*, decided February 9, 1931, not yet reported. Other cases adopting the same view, and holding that a control, based upon proxies, acquiescence, contracts or similar relations, was sufficient, are *Kile and Morgan Co. v. Commissioner*, 41 F. (2d) 925 (C. C. A. 1st); *J. Rogers Flannery and Co. v. Commissioner*, 42 F. (2d) 11 (C. C. A. 3rd); *Pelican Ice Co. v. Commissioner*, 37 F. (2d) 285 (C. C. A. 5th); *Great Lakes Hotel Co. v. Commissioner*, 30 F. (2d) [illegible] (C. C. A. 7th); and *Eby Shoe Co., Inc., v. United States*, 44 F. (2d) 278 (C. Cls.).

This Court had the same conflict before it in the petition of *Burnet* v. *J. Rogers Flannery and Company*, and related petitions, Nos. 523–525, October Term, 1930, but it denied certiorari December 1, 1930. Those cases held that legally enforceable control was not essential for affiliation.

The 1924 and subsequent Acts have omitted the word "control," as applied to affiliated companies, and have definitely stated that 95 per cent of the stock shall be owned by the same interests. Likewise, where the 1921 and previous Acts require ownership or control of a substantial amount of the stock of one company by another, the 1924 and subsequent Acts have struck out the word "control," and required that 95 per cent of the stock be owned in order to file a consolidated return. Revenue Act of 1924, c. 234, sec. 240, 43 Stat. 288; Revenue Act of 1926, c. 27, sec. 240, 44 Stat. 46; Revenue Act of 1928, c. 852, sec. 501 (a), 45 Stat. 869. The question in the present case can not arise under the 1924 and subsequent Acts, and so it will gradually cease to be a point of practical controversy.

Some question may remain as to what are "the same interests" under the 1924 and subsequent Acts, but the changes in the later Acts have done away with the principal sources of contention of the 1921 and earlier Acts.

A large number of cases involving consolidated returns under the Revenue Acts of 1917, 1918, and 1921 are still under consideration in the Bureau of

Internal Revenue, and although it is not practicably possible to ascertain how many cases are pending which involve the question raised in the instant case, we are not in a position to state that it may not be involved in a considerable number.

CONCLUSION

In spite of the fact that there is conflict between the decision of the court below and several other Circuit Courts of Appeals, we submit that the same reasons exist for denying the petition for certiorari which prompted the Court to deny the petition in *Burnet* v. *J. Rogers Flannery and Company* and related petitions, Nos. 523–525, October Term, 1930.

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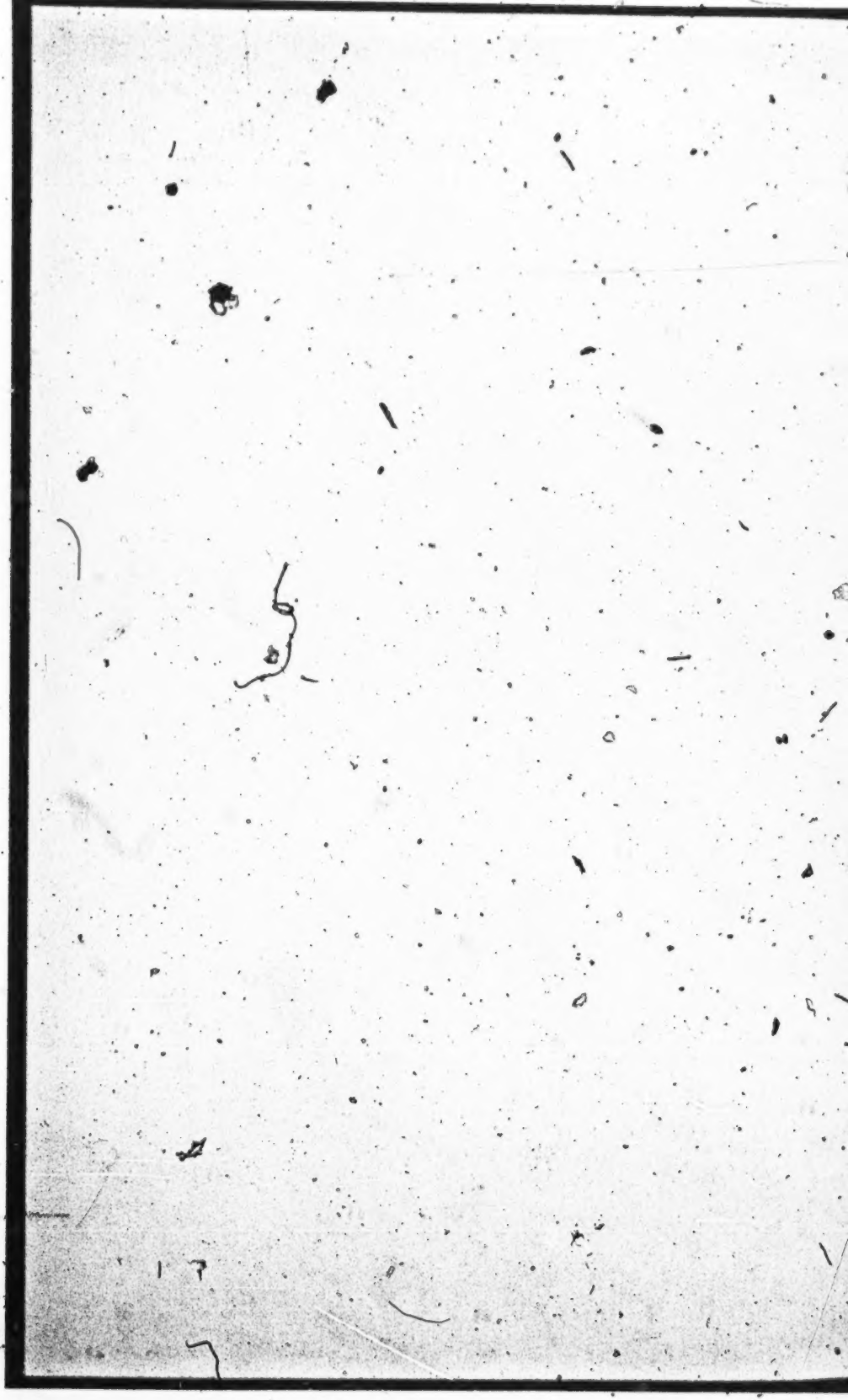
MARCH, 1931.



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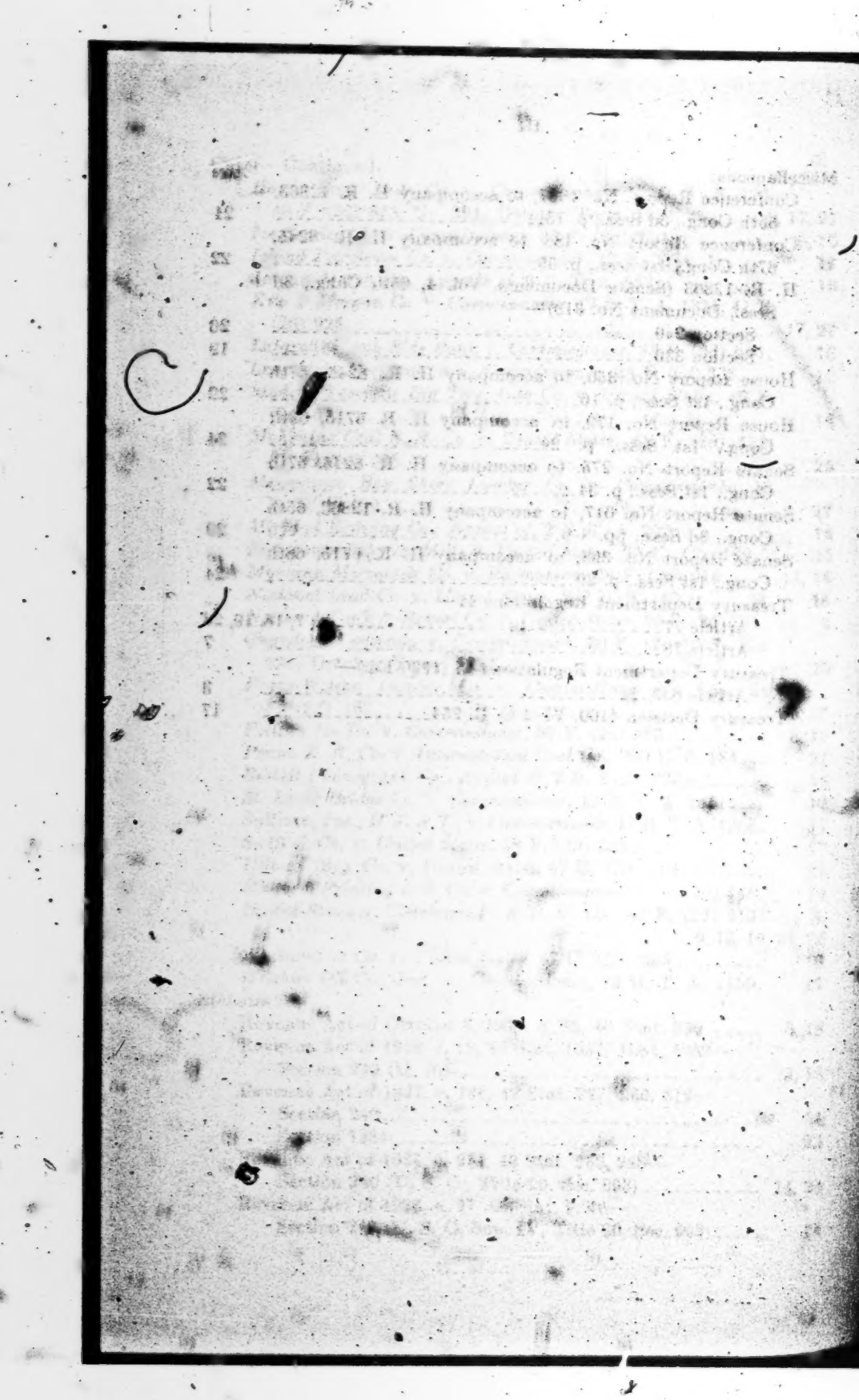

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 14

HANDY AND HARMAN, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the United States Board of Tax Appeals (R. 21–24) is reported in 17 B. T. A. 980. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 46–49) is reported in 47 F. (2d) 184.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 12, 1931. (R. 49.) Petition for a writ of certiorari was filed February 5, 1931. Certiorari was granted March 16, 1931. (R. 50.)

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether two companies may file a consolidated income-tax return as affiliated corporations under Section 240 of the Revenue Act of 1918 if the two companies are operating as a business unit and their stock is under the actual, but not legally enforceable, control of the same interests.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1081, 1082:

> SEC. 240. (a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return: * * *.
>
> (b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.

Treasury Department Regulations 45 (1920 Edition):

ART. 633. *When corporations are affiliated.*—* * * The words "the same interests" shall be deemed to mean the same individual or partnership or the same individuals or partnerships, but when the stock of two or more corporations is owned or controlled by two or more individuals or by two or more partnerships a consolidated return is not required unless the percentage of stock held by each individual or each partnership is substantially the same in each of the affiliated corporations.

STATEMENT

Petitioner is a New York corporation engaged in the silversmithing business, its factory being located at Bridgeport, Connecticut. (R. 17.)

In December, 1916, the officers of the petitioner caused Hamilton & DeLoss, Inc., to be organized as a corporation under the laws of Connecticut to take over a department of the petitioner's business. Mr. Hamilton, a man experienced in silversmithing, became president of the new corporation. (R. 18.) He was without funds to purchase stock therein and DeLoss, vice president of petitioner (R. 18), made arrangements at a bank whereby Hamilton borrowed the money necessary to purchase 20% of the stock of Hamilton & DeLoss, Inc., upon his notes indorsed by DeLoss (R. 18–19, 36–37). The stock was issued to Hamilton (R. 19), who in turn ex-

stitted an "Irrevocable Stock Power" assigning such stock to Robert W. Higgins (R. 36-38), who in turn executed a similar instrument assigning the stock to DeLoss, who deposited it with the bank as collateral security for the payment of the notes (R. 37). Hamilton never paid anything on the notes. In 1919 he became insolvent and on February 1, 1919, DeLoss paid the notes and took over the stock. (R. 19, 37.) Prior to February 1, 1919, Hamilton attended all stockholders' meetings of Hamilton & DeLoss, Inc., and always voted his stock in harmony with the men who controlled both corporations. (R. 19.) He received a salary from Hamilton & DeLoss, Inc., but its other directors and officers, who were also directors, officers, or employees of petitioner, received their compensation from petitioner, even though all or a part of their working hours were devoted to Hamilton & DeLoss, Inc. (R. 19.)

During the taxable period in question Hamilton owned no stock in the petitioner, six men owned 93.71% of the capital stock of petitioner, and from 75.74% to 76.66% of the capital stock of Hamilton & DeLoss, Inc. Parties having no stock in Hamilton & DeLoss owned 6.29% of the stock of the petitioner. Others owning no stock of petitioner held from 3.83 to 3.34% of the stock of Hamilton & DeLoss, Inc. (R. 18.) They were close friends of DeLoss but took no active part in the business of Hamilton & DeLoss, Inc. Their stock was voted for them under proxies given to DeLoss. (R. 19.)

The Commissioner of Internal Revenue held that the petitioner and Hamilton & DeLoss were not entitled to file consolidated returns for the period preceding February 1, 1919 (R. 21), and his ruling was sustained by the Board of Tax Appeals (R. 21–24). On petition for review the Circuit Court of Appeals for the Second Circuit affirmed the order of the Board of Tax Appeals. (R. 29.) The question of affiliation of the two companies after February 1, 1919, when DeLoss took over Hamilton's stock, is not involved.

SUMMARY OF ARGUMENT

The only question here presented is whether "the same interests" owned or controlled "substantially all the stock" of the two companies. Hamilton, Blackburn, and Fones owned 24.26% to 23.34% of the stock of Hamilton & DeLoss, Inc., and no stock in the petitioner. The remaining 75.74% to 76.66% of the stock of Hamilton & DeLoss, Inc., did not constitute "substantially all" the stock of that company.

While the owners of the 24.26% to 23.34% of the stock of Hamilton & DeLoss at no time voted their stock in opposition to the principal stockholders of petitioner and acquiesced in the management of the two companies by the principal stockholders, never-

[illegible] control exercised by the principal stock-

[illegible] and the "control" [illegible] by the statute

[illegible] "control" required by the statute is a con-

[illegible] of the stock of the corporation and not a con-

trol of the business. It is a "control" based upon a legal right, exercised by one possessing a beneficial interest.

The principal stockholders of the petitioner exercised no such control over the stock of Hamilton & DeLoss, Inc., which they did not own. Neither did these principal stockholders and the holders of the 24.26% to 23.34% of the stock of Hamilton & DeLoss, Inc., constitute "the same interests" within the meaning of the statute, Article 633, Treasury Department Regulations 45, *supra*. Therefore "the same interests" neither owned nor controlled "substantially all" the stock of Hamilton & DeLoss, Inc., and hence affiliation was properly disallowed.

ARGUMENT

"SUBSTANTIALLY ALL" OF THE "STOCK" OF THE TWO CORPORATIONS WAS NEITHER "OWNED" NOR "CONTROLLED" BY "THE SAME INTERESTS"

In the administration of the war income and excess-profits tax provisions of the Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, it was found that by creating subsidiaries and artificially apportioning thereto a part of its net profits a corporation could readily avoid much of the excess-profits taxes imposed upon income falling within the higher brackets. See *Pelican Ice Co.* v. *Commissioner*, 37 F. (2d) 285, 286. To correct this situation and enable the Commissioner to compute the amount of the tax properly due from each corporation on the basis of an equitable and lawful accounting, Article

77 and 78 of Treasury Department Regulations 41 were promulgated, requiring corporations, under certain circumstances, to file consolidated returns. (See Article 77, Regulations 41, p. 10.) The underlying purpose of Articles 77 and 78 was carried forward and incorporated in modified form in Section 240 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. This section required corporations to file consolidated returns "(1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

While this statute had for its primary purpose the benefit of the taxing power, in practice it has quite generally operated to the advantage of the taxpayers. (See cases, *infra*.) As a result there has been a constant effort on the part of corporations operated under a general business control to so extend the statute as to permit their filing a single joint return. Thus, in the instant case the petitioner and Hamilton & DeLoss filed consolidated returns of income for the taxable periods preceding February 11, 1919. (R. 21.) However, the Commissioner ruled that they were not entitled to file such consolidated returns. (R. 21.) This ruling was sustained by the Board of Tax Appeals (R. 33-34) and by the Circuit Court of Appeals for the Second Circuit (R. 49).

Under the provisions of Section 240 (b), *supra*, before two or more corporations are entitled to affiliation it must appear (1) that one corporation "owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others," or (2) that "substantially all the stock of two or more corporations is owned or controlled by the same interests."

The petitioner neither owned nor controlled any of the stock of Hamilton & DeLoss, Inc., and therefore it can not be said that the two corporations were affiliated under the first subdivision of Section 240 (b).

The second subdivision of Section 240 (b) prescribes three prerequisites to affiliation: (1) "the same interests" must (2) own or control (3) "substantially all the stock" of the two or more corporations. The stockholders of petitioner owned but 75.74% to 76.66% of the stock of Hamilton & DeLoss, Inc. It has been held that 85% (*Burnet v. Bank of Italy*, 46 F. (2d) 629, 630 (C. C. A. 9th)), 77 to 84% (*United States v. Cleveland, P. & E. R. Co.*, 42 F. (2d) 413, 419 (C. C. A. 6th)), 83⅓% (*Jos. Denunzio Fruit Co. v. Commissioner*, 49 F. (2d) 41 (C. C. A. 6th)), 80% (*Washburn & Co. v. United States*, 67 C. Cls. 235)), 75% (*American Auto Trimming Co., Michigan, v. Lucas*, 37 F. (2d) 801, 803 (App. D. C.), *Alameda Inv. Co. v. McLaughlin*,

28 F. (2d) 81 (N. D. Calif.)), and [illegible] (*National Tank & Export Co. v. United States*, 35 F. (2d) 331 (S. D. Ga.)), do not constitute "substantially all of the stock of a corporation." Clearly the 75.74% to 76.66% of the stock of Hamilton & DeLoss, Inc., standing in the names of stockholders of petitioner did not constitute "substantially all" the stock of Hamilton & DeLoss, Inc.

The question is therefore presented whether petitioner's stockholders "controlled" any of the stock of Hamilton & DeLoss, Inc., which they did not own. In considering this question it seems clear that the statute refers to stock control and not to control of the business. *Ice Service Co. v. Commissioner*, 39 F. (2d) 280, 281 (C. C. A. 2d); *Commissioner of Internal Revenue v. Adolph Hirsch & Co.*, 30 F. (2d) 645, 646 (C. C. A. 2d); *American Auto Trimming Co., Michigan, v. Lucas*, 37 F. (2d) 801, 803 (App. D. C.); *United States v. Cleveland, P. & E. R. Co.*, 42 F. (2d) 413, 419 (C. C. A. 6th). However, *Howes Bros. Hide Co. v. Commissioner*, 49 F. (2d) 878 (C. C. A. 1st), holds that general business control is enough. Petition for certiorari has been filed by the Commissioner, No. 294, October Term, 1931.

Blackburn and Foner, owning from 3.83 to 3.84% of the stock of Hamilton & DeLoss, Inc. (R. 18), were close friends of DeLoss, who voted their stock by proxies (R. 19). Hamilton, owning 20% of the

stock of Hamilton & DeLoss, Inc.,[1] attended all meetings of the stockholders and voted his stock, but never in opposition to the principal stockholders of petitioner. (R. 19.) But a domination by majority stockholders resting only upon an acquiescence which they had the good fortune to induce without the right to demand is not the "control" of stock contemplated by the statute.

The court below held that the control contemplated by the statute "must at least be a control legally enforceable" (R. 48), thus following its former holdings in *Commissioner of Internal Revenue* v. *Adolph Hirsch & Co.*, 30 F. (2d) 645, 646, and *Ice Service Co.* v. *Commissioner*, 30 F. (2d) 230, 231, to which it has subsequently adhered *Commissioner* v. *Gong Bell Mfg. Co.*, 48 F. (2d) 205, 206 (petition for certiorari pending, No. 97, October Term, 1931, consideration withheld pending decision in the instant case); *Commissioner* v. *City Button Works*, 49 F. (2d) 705, 706 (petition for certiorari pending, No. 293, October Term, 1931); *The Onondaga Company* v. *Commissioner*, 50 F. (2d) 337 (petition for certiorari has been filed in this case, No. 320, October Term, 1931).

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[1] While Hamilton assigned his stock to DeLoss as security for his bank's endorsement of Hamilton's notes, DeLoss in turn pledged the stock with the bank. (R. 36-38, 46.) The [illegible] and control of the stock either remained in Hamilton (*Lancaster Corporation* v. *Commissioner*, [illegible] C. C. A. 6th) or [illegible] (*Falcon Ice Co.* v. *Commissioner*, 37 F. (2d) 235, 236 C. C. A. 5th), or were transferred to the bank. The majority stockholders [illegible] control over the bank.

The meaning to be attributed to the word "control" or "controlled" has been many times before the courts. In *Alameda Investment Co. v. McLaughlin*, 28 F. (2d) 81, Judge Bourquin, sitting in the District Court for the Northern District of California, considered the meaning to be attached to the word "control" or "controlled." He said (p. 82):

> And managerial authority of [illegible] president of plaintiffs [illegible] plaintiffs no beneficial interest in the other 25 per cent of Alameda stock, nor hazard, no liability in respect to taxes affecting its owner. Hence, was not that "control" of said 25 per cent of Alameda which the statute contemplated, nor within the statute were plaintiffs affiliated. If this be not correct, then several corporations, without mutuality of interest, save a common agent or manager, could claim the benefit of the statute.

And again, in *Montana Mercantile Co. et al. v. Rasmusson*, 28 F. (2d) 216 (Mont.), he said:

> But it is by plaintiffs contended that various shares of the Western stock, not owned by the Montana shareholders, were owned by relatives and friends of the former, and that the Montana management "dictated" the policy of the Western. Even so, this is not the "control" contemplated by section 240 of the Revenue Acts (1918, 40 Stat. 1081; 1921, 42 Stat. 260), by virtue of which the corporations are "affiliated" within the statute, and entitled to consolidated in-

come-tax returns with corresponding advantages in lessened taxes.

The control by the statutes contemplated is that which gives rise to beneficial interest, and not mere exercise of authority, whether legal or illegal, granted or seized, not that permitted by reason of friendliness or relationship (of "their sisters and their cousins and their aunts"), or the activity or neglect and violation of duty of the boards of directors.

These views of Judge Bourqin were approved by the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Adolph Hirsch & Co.*, 30 F. (2d) 645, 646, wherein it was said:

The management of the business of the corporation is not the control required by the statute. It refers to stock control. The fact that the minority is acquiescent, and permits the majority to manage the business, does not prove actual control over the minority interest. Nor does a control based upon friendship or professional relations satisfy the statute. The control of the stock owned by the same interests refers to beneficial interest.

This statement was quoted with approval by the Court of Appeals of the District of Columbia in *American Auto Trimming Co., Michigan*, v. *Lucas*, 87 F. (2d), 801, 803, where the court concluded:

That no officer or employee attempted to oppose the will of Benjamin Godfredson in the management of the companies is not controlling.

In *United States* v. *Cleveland, P. & E. R. Co.*, 42 F. (2d) 413, the Circuit Court of Appeals for the Sixth Circuit, after extensively reviewing the history of affiliation legislation and the decisions rendered thereunder, said (p. 419):

> While the grant of proxies by some and the failure by others to vote at the annual meetings might be deemed an acquiescence in defendant's *economic control* of the Ashtabula Company, that, in our judgment, and under the great weight of the decisions, does not suffice for affiliation.

A similar view was expressed in *Goldstein Bros. Amusement Co.* v. *White*, 32 F. (2d) 287 (Mass.). See *Jos. Denunzio Fruit Co.* v. *Commissioner*, 49 F. (2d) 41 (C. C. A. 6th); *Madera Yosemite Big Tree Auto Co.* v. *United States*, 49 F. (2d) 672, 678 (C. Cls.).

It is submitted that the "control" necessary to satisfy the statute must be a control of the stock as distinguished from a control of the business and that such control must be based upon a legal right exercised by one possessing a beneficial interest in such stock. It is obvious that the stockholders of petitioner exercised no such control over the stock which they did not themselves own. It follows that unless it may be said that Hamilton (owning 20% of the stock of Hamilton & DeLoss, Inc.) and the majority stockholders of petitioner constituted "the same interests," the petitioner and

Hamilton & DeLoss, Inc., were not entitled to affiliation.

Article 633 of Treasury Department Regulations 45, *supra*, defines "the same interests" as meaning "the same individual or partnership or the same individuals or partnerships." This article further provides:

> * * * but when the stock of two or more corporations is owned or controlled by two or more individuals or by two or more partnerships a consolidated return is not required unless the percentage of stock held by each individual or each partnership is substantially the same in each of the affiliated corporations.

Congress continued to use the term "the same interests" in Section 240 (c) of the Revenue Acts of 1921, 1924, and 1926 (c. 136, 42 Stat. 227; c. 234, 43 Stat. 253, U. S. C., Title 26, Sec. 993; c. 27, 44 Stat. 9, U. S. C. Sup. IV, Title 26, Sec. 993), and it will be presumed, therefore, that the administrative interpretation of the meaning of the phrase met with Congressional approval. *National Lead Co.* v. *United States*, 252 U. S. 140, 146–147; *Brewster* v. *Gage*, 280 U. S. 327, 336; *American Auto Trimming Co., Michigan*, v. *Lucas*, 37 F. (2d) 801, 803 (App. D. C.); *Uniform Printing & S. Co.* v. *Commissioner*, 33 F. (2d) 445, 447 (App.

While the meaning of the phrase "the same interests" is not necessarily involved, it is submitted that a careful analysis of the decisions cited by petitioner, and the legislative history of Section 240 (see pp. 18 to 25, *infra*), makes it necessary that the meaning of this phrase be considered.

D. C.); *Commissioner* v. *City Button Works*, 49 F. (2d) 705, 706 (C. C. A. 2d). (Petition for certiorari has been filed in the latter case, No. 293, October Term, 1931.) This administrative interpretation, presumptively approved by Congress, was clearly justified. It was approved in *Lafayette-South Side Bank* v. *Commissioner*, 33 F. (2d) 646, 647–648 (App. D. C.); and by the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Adolph Hirsch & Co.*, 30 F. (2d) 645, wherein it was said (p. 646):

> Stockholders of two or more corporations, if the same persons, and their holdings in different corporations are in the same proportion, bear the ultimate burden of taxes equally and equitably, regardless of whether it rests primarily upon one or the other of the affiliated corporations, if only such corporations be deemed affiliated, but it is where the proportions of the stockholders are different that inequities result. * * * These stockholders would suffer disadvantages and might receive benefits through the operations of the respondent, in which they have no interest or representation. Thus there is no fair basis of affiliation of ownership, and there is no control of substantially all of the stock by the same interests.

And in *Commissioner* v. *City Button Works*, *supra*, the same court again sustained the regulations, saying (p. 706):

> However that may be, when as here the distribution is unequal, it appears to us that the

section does not apply, for it is not enough that the gross income of each company goes to the same persons. That condition would be fulfilled in a case where half the shareholders held ninety per cent of the shares in one company and ten per cent in the other, and the other half, vice versa. It would be a forced construction which should regard such a pair as a single "business unit"; the phrase used in the Senate Committee report upon the section. Not only would the management of each company be in a different group but the interest of each majority in the respective incomes would be different. On neither score would it be in accord with general notions to think of the two companies as one.

For this reason the regulations under the Act of 1918 (article 633, Regulations 45) provided that the holdings must be substantially in the same proportions in each company, and the same was repeated under the Act of 1921 (article [illegible]3, Regulations 62). The enactment of the second statute was a legislative recognition of this regulation.

To the same effect see *American Auto Trimming Co., Michigan*, v. *Lucas*, 37 F. (2d) 801, 803 (App. D. C.); *Goldstein Bros. Amusement Co.* v. *White*, 33 F. (2d) 787, 788 (Mass.); *Montana Mercantile Co.* v. *Rasmusson*, 28 F. (2d) 916 (Mont.).[1]

[1] The Board of Tax Appeals refused to follow the administrative interpretation of the meaning of the phrase "the same interests" (see *Appeal of Rishell Phonograph Co.*, 2 B. T. A. 229, 233; *Appeal of Midland Refining Co.*, 2 B. T. A. 293, 296; *Appeals of Jordan Marsh Co. et al.*, 3 B. T. A.

It would seem, therefore, that there may be included in "the same interests" only those stockholders who held stock in each of the two corporations in substantially the same proportions. Since Hamilton, Blackburn, and Fones owned no stock in petitioner it is obvious that only the stockholders of petitioner holding the 75.74 to 76.66% of the stock of Hamilton & DeLoss, Inc., may, in any event, be

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556, 557; *Appeal of Germantown Braid Co.*, 3 B. T. A. 1336; *Adolph Hirsch & Co.* v. *Commissioner*, 7 B. T. A. 707, 711; *Century Music Publishing Co.* v. *Commissioner*, 12 B. T. A. 647, 651; *Wilshire Oil Co., Inc.*, v. *Commissioner*, 13 B. T. A. 1150, 1153–1154); with the result that affiliation was allowed under the Board's interpretation of the meaning of the phrase "the same interests," but the Commissioner could not compel affiliation under the Board's interpretation of the statute by reason of his regulations. Therefore, on November 12, 1927, the regulations were amended by deleting the above definition from Treasury Regulations 45, T. D. 4100, VI–2 C. B. 254. However, since the administrative interpretation had by that time been presumptively approved by Congress the Commissioner was without power to change the law and the attempted amendment had no retroactive force. *Swift & Co.* v. *United States*, 38 F. (2d) 365, 373 (C. Cls.). Since judicial approval of the administrative interpretation by the Commissioner was obtained in *Commissioner* v. *Adolph Hirsch & Co.*, 30 F. (2d) 645, both the Commissioner and the Board of Tax Appeals have consistently applied the original administrative interpretation of the statute. See *Island Petroleum Co.* v. *Commissioner*, 17 B. T. A. 1, 10; *Conley Tin Foil Corporation* v. *Commissioner*, 17 B. T. A. 65, 71–72; *Howes Brothers Hide Co. et al.* v. *Commissioner*, 17 B. T. A. 129, 134–135; *St. Louis Bridge Co. et al.* v. *Commissioner*, 17 B. T. A. 185, 194; *D. J. & T. Sullivan, Inc.*, v. *Commissioner*, 17 B. T. A. 1359, 1360; *Kile & Morgan* v. *Commissioner*, 17 B. T. A. 1371, 1375; *Mammoth Bay Shore Lumber Co.* v. *Commissioner*, 18 B. T. A. 499, 502–503.

regarded as "the same interests," and since these stockholders neither owned nor controlled "substantially all the stock" of Hamilton & DeLoss, Inc., it follows that the Board of Tax Appeals and the Circuit Court of Appeals properly held that the two companies were not entitled to affiliation.

The legislative history of Section 240 (b) of the Revenue Act of 1918 clearly supports the above interpretation of the meaning to be given to the word "control" and the phrase "the same interests" as used therein. Consolidated returns were first required by Article 77 of Treasury Department Regulations 41, promulgated under the War Revenue Act of October 3, 1917, c. 63, 40 Stat. 300. This article provided:

> For the purpose of this regulation two or more corporations will be deemed to be affiliated (1) when one such corporation owns directly or controls through closely affiliated interests or by a nominee or nominees, all or substantially all of the stock of the other or others, or when substantially all of the stock of two or more corporations is owned by the same individual or partnership, and both or all of such corporations are engaged in the same or a closely related business; or (2) when one such corporation (a) buys from or sells to another products or services at prices above or below the current market, thus effecting an artificial distribution of profits, or (b) in any way so arranges its financial

relationships with another corporation as to assign to it a disproportionate share of net income or invested capital.

It will be observed that that part of this regulation covered by subdivision (1) corresponds very closely to Section 240 (b) as incorporated in the Revenue Act of 1918, while subdivision (2) provided for affiliation where two or more companies were operated as an economic or business unit under a general business control. See *United States* v. *Cleveland, P. & E. R. Co.*, 42 F. (2d) 413, 419 (C. C. A. 6th).

When H. R. 12863, which became the Revenue Act of 1918, was first passed by the House of Representatives Section 336 thereof provided (Senate Documents, Vol. 4, 65th Congress, 3d Session, Document 310, p. 107):

> In no case shall the tax under this title [Excess Profits Tax] or Title II [Income Tax] be determined on the basis of a so-called consolidated return but shall in each case be determined upon the basis of the net income and invested capital of the corporation liable to the tax.

The Senate Finance Committee, however, thought it desirable that Article 77 of Treasury Regulations 41 be incorporated in the Bill. It therefore struck out Section 336, *supra*, and incorporated the provisions of Article 77 of Regulations 41 in Section 240. (H. R. 12863, Senate Documents, Vol. 4, 65th Congress, 3d Session, Document No. 310, p. 88.) In making its report to the Senate the Committee said

(Senate Report No. 617, to accompany H. R. 12863, 65th Congress, 3d Session, pp. 8–9):

CONSOLIDATED RETURNS

Provision has been made in section 240 for a consolidated return, in the case of affiliated corporations, for purposes both of income and profits taxes. * * *

* * * * * * *

While the committee is convinced that the consolidated return tends to conserve, not to reduce, the revenue, the committee recommends its adoption not primarily because it operates to prevent evasion of taxes or because of its effect upon the revenue, but because *the principle of taxing as a business unit what in reality is a business unit is sound and equitable and convenient both to the taxpayer and to the Government.* (Italics ours.)

Acting upon the Committee's recommendation the Senate passed the Bill as amended. Section 240 (b) of the Bill then provided (Senate Documents, Vol. 4, H. R. 12863, Document No. 310, 65th Congress, 3d Session, pp. 65–66):

SEC. 240. (b) For the purpose of this section, two or more corporations shall be deemed to be affiliated—

(1) If one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or if substantially all the stock of two or more cor-

> porations is owned or controlled by the same interests, or if one such corporation buys from or sells to another products or services at prices above or below the current market, thus effecting an artificial distribution of profits, or in any way so arranges its financial relationships with another corporation as to assign to it a disproportionate share of net income or invested capital.
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> * * * * * *

In conference the provision relating to the economic unit or general business control theory of affiliation corresponding to subdivision (2) of Article 77, Regulations 41, was stricken out (See H. R. Conference Report No. 1037, p. 15, 65th Congress, 3d Session, to accompany H. R. 12863), and the Act finally emerged without those provisions being included as grounds for affiliation.

In *United States v. Cleveland, P. & E. R. Co.*, *supra*, in considering the effect to be given to the action of Congress in deleting the above provisions from Section 240 (b) of the Revenue Act of 1918 the court said (p. 416):

> In summary it may be seen from this history of section 240 (b) that, although Congress [the Senate] obviously attempted to adopt the existing Treasury practice which considered as affiliated any group of corporations engaged in similar businesses and operated as an economic unit, the statute which finally emerged from the legislative mill predicated affiliation entirely upon *stock ownership or control*. Much of the dif-

Easily in reconciling the conflicting interventions of the section may be attributed to judicial endeavors to effectuate this unexpressed purpose by reading it into the loose terminology of *ownership and control* or by stretching the phrase "same interests."

When H. R. 8245, which later became the Revenue Act of 1921, c. 136, 42 Stat. 227, was before the House it appears that the validity of Article 77 of Treasury Regulations 41 as affecting 1917 taxes had been brought into question. For that reason Section 1007 of the Bill as reported out of Committee provided for its retroactive validation. (Committee on Ways & Means, House Report No. 350, to accompany H. R. 8245, 67th Congress, 1st Sess., p. 16.) When the Bill reached the Senate Section 1007 was eliminated and Section 1331 was inserted. (Senate Committee on Finance, Report No. 275, to accompany H. R. 8245, 67th Congress, 1st Sess., p. 34; Conference Report No. 486, to accompany H. R. 8245, 67th Congress, 1st Sess. p. 59.) As the Bill finally emerged instead of making subdivision

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Revenue Act of 1921, c. 136, 42 Stat. 227, 319:

SEC. 1331. (a) That Title II of the Revenue Act of 1917 shall be construed to impose the taxes therein mentioned upon the basis of consolidated returns of net income and invested capital in the case of domestic corporations and domestic partnerships that were affiliated during the calendar year [illegible]

For the purpose of this section a corporation or partnership is affiliated with one or more corporations or partnerships when such corporation or partnership is directly or indirectly connected through closely affiliated interests by a common ownership of substantially all the

(2) of Article 77 of Treasury Regulations [illegible] additional separate ground for [illegible] required that the corporations be [illegible] consolidate unit as a condition precedent [illegible] under subdivision (1). *Montgomery Cotton Mills v. United States*, 67 C. Cls. 169, 171.

When H. R. 6715, which later became the Revenue Act of 1924, c. 234, 43 Stat. 253, was before the House Committee on Ways and Means that Committee was apparently advised of the tendency of the taxpayers and the courts to defeat the limitations intended to be prescribed in Section

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stock of the other or others, or (2) when substantially all the stock of two or more corporations or the business of two or more partnerships was owned by the same interests: *Provided*, That such corporations or partnerships were engaged in the same or a closely related business, or that corporation or partnership bought from or sold to another corporation or partnership products or services at prices above or below the current market, thus affecting an artificial distribution of profits, or that corporation or partnership in any way so arranged its financial relationships with another corporation or partnership as possibly to lift a disproportionate share of net income or invested capital. For the purpose of this section, public service corporations which (1) were operated independently, (2) were not physically connected or merged and (3) did not receive a part [illegible] to make a consolidated return, shall not be considered to be affiliated additionally by a contract or other public utility which was owned by an industrial corporation and [illegible] operated as a plant facility or as an integral part of a group organization of affiliated corporations which were required to file a consolidated return, shall be considered to have been affiliated.

[illegible] provisions of this section are declaratory of the [illegible] of the Revenue Act of 1917."

240 of the Revenue Acts of 1918 and 1921. Accordingly, in reporting the Bill to the House the Committee with relation to Section 240 said (House Report No. 179, to accompany H. R. 6715, 68th Congress, 1st Session, p. 24):

> Subdivision (e) is amended to provide that two or more corporations shall be deemed to be affiliated if one corporation *owns* at least 85 per cent of the voting stock of the others or if at least 85 per cent of the voting stock of two or more corporations is *owned* by the same interests. *This language is substituted for the indefinite and vague language of the existing law.* * * * (Italics ours.)

When the Bill reached the Committee on Finance of the Senate the percentage of stockholdings was raised to 95. In explaining the elimination of the word "control" from the statute the Committee in reporting to the Senate repeated what the House Committee had said with relation to the "indefinite and vague language of the existing law." (Senate Report No. 398, to accompany H. R. 6715, 68th Congress, 1st Session, p. 29.) The recommendation of the House Committee as amended by the Senate was ultimately incorporated in Section 240 (c) of the Revenue Act of 1924 and the word "control" was eliminated from the statute.[1]

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[1] Revenue Act of 1924, c. 234, 43 Stat. 253, 288:

"SEC. 240. (c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns at least 95 per centum of the voting

It thus appears that Congress has on several occasions definitely refused to sponsor the theory that affiliation should be allowed or required where two or more corporations were operated merely as an economic unit under a general business control.

Congress having rejected this theory of affiliation, the courts may not so interpret the statute as to add thereto the rejected provision. But that is exactly what some of the courts have attempted to do. Thus in *J. Rogers Flannery & Co.* v. *Commissioner*, 42 F. (2d) 11, 12 (C. C. A. 3d), certiorari denied, 282 U. S. 889, the court quoted from Senate Report No. 617, *supra*, and then proceeded to read the report into the statute although the provision relating to the business or economic unit theory of affiliation was rejected in conference and never became a part of the law. In *Mahoning Coal R. Co.* v. *United States*, 41 F. (2d) 533, 535–536 (N. D. Ohio), reversed, 51 F. (2d) 208 (C. C. A. 6th), the District Court similarly attempted to read Senate Finance Report No. 617 into Section 240 (b) of the Revenue Acts of 1918 and 1921.

Other courts have sponsored the business or economic unit theory of affiliation. *Great Lakes Hotel Co.* v. *Commissioner*, 30 F. (2d) 1, 4 (C. C. A. 7th); *Commissioner* v. *Richfield Oil Co.*, 42 F. (2d) 360, 362 (C. C. A. 9th); *Burnet* v. *Wilshire Oil Co.*, 46 F. (2d) 975 (C. C. A. 9th); *Peavy-Wilson Lumber Co.* v. *Commissioner Int. Rev.*, 51 F. (2d) 163 (C. C.

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stock of the other or others, or (2) if at least 95 per centum of the voting stock of two or more corporations is owned by the same interests. * * *." (U. S. C., Title 26, Sec. 998.)

A. 5th); *Ullman Mfg. Co.* v. *United States*, 67 C. Cls. 104, 111.

This end has been accomplished by reading "into the loose dichotomy of *ownership* and *control*" that which Congress intentionally excluded, or "by stretching the phrase 'same interests.'" *United States* v. *Cleveland, P. & E. R. Co.*, *supra*, p. 416. Thus it has been held that a "control" based upon "ownership, contract, and *otherwise*" (italics ours), (*Commissioner* v. *Crescent Leather Co.*, 40 F. (2d) 833, 835 (C. C. A. 1st); fear of employee stockholder that opposition to majority might result in loss of position (*Commissioner* v. *Richfield Oil Co.* (C. C. A. 9th), *supra*, pp. 361-362); right to discharge an employee who had agreed that "in the event his connection with said company should be severed he would sell said stock to the plaintiff at a reasonable price" (*Ullman Mfg. Co.* v. *United States* (C. Cls.), *supra*, p. 109); "an understanding that if any minority stockholder wished to sell his stock, it should first be offered for sale to" a majority stockholder, and "as a matter of practice such minority stockholders offered their stock" to the majority stockholder which offers were always accepted, together with a practice of the minority stockholders giving proxies to the majority stockholder (*Great Lakes Hotel Co.* v. *Commissioner*, 30 F. (2d) 1, 4 (C. C. A. 7th)); acquiescence of business associates (*Burnet* v. *Wilshire Oil Co.* (C. C. A. 9th), *supra*); acquiescence of members of families, employees, and other minority stock-

holders, and right to call preferred voting stock for redemption on 90 days' notice (*Hoover Bros. Hide Co.* v. *Commissioner*, 49 F. (2d) 878 (C. C. A. 1st), petition for certiorari filed by the Commissioner, No. 294, October Term, 1931); or acquiescence of members of families, employees, business associates and friendly banks (*Peavy-Wilson Lumber Co.* v. *Commissioner* (C. C. A. 5th), *supra*); satisfied the requirements of the statute; and that there may be included in "the same interests" members of the same family regardless of their respective holdings (*Kile & Morgan Co.* v. *Commissioner*, 41 F. (2d) 925 (C. C. A. 1st); *Eby Shoe Co.* v. *United States*, 44 F. (2d) 273, 277 (C. Cls)), and majority stockholders in each of six corporations being "guided in their action by a common intent" where their common object was to be attained "by all corporations pursuing the same methods through the same agencies" (*Great Lakes Hotel Co.* v. *Commissioner*, *supra*, p. 4).

Thus it will be seen that by reading into the Act the substance of Senate Finance Committee Report No. 617, *supra*, some of the courts have, in effect, incorporated into the statute a provision which was clearly rejected by Congress. Obviously this may not be done. In *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198-199, this Court had a similar situation before it. There it said:

> The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant,

but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement, made by a member of the Senate Conference Committee, to support the present argument that § 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different.

This states substantially the vice of petitioner's argument based upon the Senate committee's comments on the original bill passed by the Senate. The business or economic theory of affiliation was rejected by Congress and those decisions, cited by petitioner, which have adopted the theory discarded by Congress are clearly wrong.

CONCLUSION

We respectfully submit that the decision of the court below should be affirmed.

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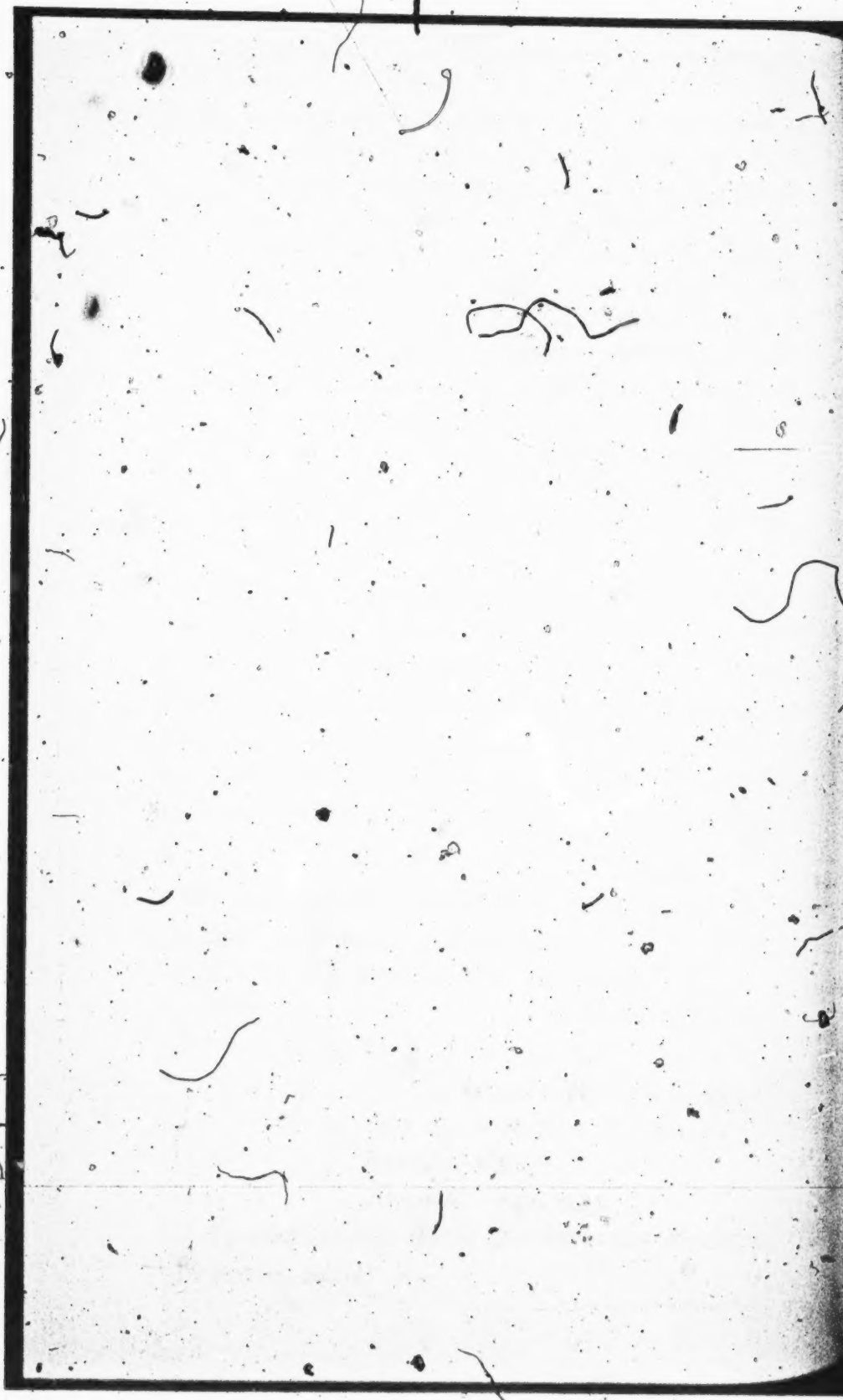
OCTOBER, 1931.



SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1931.

Handy and Harman, Petitioner, vs. David Burnet, Commissioner of Internal Revenue. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 23, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner claims that it and Hamilton & DeLoss, Inc., were affiliated corporations as defined by § 240 of the Revenue Act of 1918 and that it is entitled to have its net income and invested capital for 1918 and the first month of 1919 determined on the basis of consolidated returns. The Commissioner of Internal Revenue held them not affiliated, rejected petitioner's claim for abatement for 1918 and asserted a deficiency for 1919. The Board of Tax Appeals approved the Commissioner's determination (17 B. T. A. 980) and upon petition for review the Circuit Court of Appeals affirmed. 47 F. (2d) 184. That decision being in conflict with decisions in other Circuit Courts of Appeals,[1] this Court granted certiorari. 283 U. S. 813.

The pertinent provisions of the section follow (40 Stat. 1081):

"§ 240 (a). That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title [Title II] and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return:

[1] Ice Service Co. v. Commissioner, 30 F. (2d) 230, and Commissioner v. Adolph Hirsch & Co. 30 F. (2d) 645. (C. C. A.-2.) United States v. Cleveland, P. & E. R. Co., 42 F. (2d) 413. (C. C. A.-6.) American Auto Trimming Co. v. Lucas, 37 F. (2d) 801. (App. D. C.)

J. Rogers Flannery & Co. v. Commissioner, 42 F. (2d) 11. (C. C. A.-3.) Pelican Ice Co. v. Commissioner, 37 F. (2d) 285. (C. C. A.-5.) Great Lakes Hotel Co. v. Commissioner, 30 F. (2d) 1. (C. C. A.-7.) Burnet v. Wilshire Oil Co., 46 F. (2d) 975. (C. C. A.-9.)

"(b). For the purpose of this section two or more domestic corporations shall be deemed to be affiliated . . . . . (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

Petitioner carried on the business of dealing in gold and silver buflion and specie and furnishing to silversmiths silver rolled into sheets or coils. In 1916 its officers caused Hamilton & DeLoss, Inc., to be organized, to erect a factory and to take over the work of its stamping department. During the taxable periods six men owned 93.71 per cent. of the stock of petitioner. The same men owned over 75 per cent. of the stock of Hamilton & DeLoss, Inc. Hamilton did not own or control any of the stock of petitioner. Twenty per cent. of the stock of the new company was issued to him and he became its president. He gave to a bank his notes endorsed by DeLoss to obtain money to pay for the stock. Before the beginning of 1918 he executed an irrevocable stock power to one Higgins, and the latter, by like instrument assigned the stock to DeLoss who deposited it with the bank as collateral security for the payment of Hamilton's notes. Hamilton failed to pay and, February 1, 1919, after the expiration of the tax periods, DeLoss paid the notes and took over the stock.

Prior to that time Hamilton attended all the stockholders' meetings but never voted in opposition to the owners of the majority stock of both corporations. Hamilton & DeLoss, Inc., paid him a salary at the rate of $10,000 per year but the other officers of that corporation, being officers, directors or employees of the petitioner, received their compensation from the latter although a large part of their time was devoted to the business of the former. During the taxable periods the corporations were operated as a business unit, and Hamilton & DeLoss, Inc., sustained a net loss.

It may be assumed that the pledge as collateral was also to protect DeLoss as endorser. But it does not appear that as between him and Hamilton he was entitled to control voting power or to have the stock transferred to him of record or to have any use or benefit therefrom unless and until required to pay the notes. It was not held by or for him. The losses sustained by Hamilton & DeLoss, Inc., did not, in respect of that stock, directly or indirectly result to his disadvantage. The section requires control of sub-

stantially all of the stock; control of the corporations is not enough.[2] The carrying on of a business unit by two or more corporations does not in itself constitute affiliation. The shares of Hamilton & DeLoss, Inc., owned by the six shareholders did not constitute substantially all of its stock.[3] We assume in favor of petitioner that they, through their power over Hamilton's official position and salary, their ability to dominate both corporations or by other means, were in position effectually to influence him in respect of the voting, use or disposition of the stock issued to him, and thus as a practical matter to exert a kind of control called by counsel "actual" to distinguish it from a legally enforceable control.

The purpose of § 240 was, by means of consolidated returns, to require taxes to be levied according to the true net income and invested capital resulting from and employed in a single business enterprise even though it was conducted by means of more than one corporation. Subsection (b) clearly reflects the intention, by means of such returns, to secure substantial equality as between shareholders who ultimately bear the burden. That intention is shown by the legislative history and was given effect by the regulations contemporaneously promulgated.[4] It requires no discussion to show that such returns will not make against inequality or evasion unless the same interests are the beneficial owners in like proportions of substantially all of the stock of each of such corporations. *Alameda Investment Co.* v. *McLaughlin*, 28 F. (2d) 81. *Montana Mercantile Co.* v. *Rasmusson*, 28 F. (2d) 916. *Commissioner* v. *Adolph Hirsch & Co.*, 30 F. (2d) 645, 646. *Commissioner*

[2]It was so held in Ice Service Co. *v.* Commissioner, 30 F. (2d) 230, 231; Commissioner *v.* Adolph Hirsch & Co., 30 F. (2d) 645, 646; American Auto Trimming Co. *v.* Lucas, 37 F. (2d) 801, 803; United States *v.* Cleveland, P. & E. R. Co., 42 F. (2d) 413, 419; Commissioner *v.* Gong Bell Mfg. Co., 48 F. (2d) 205, 206; Onondaga Company *v.* Commissioner, 50 F. (2d) 397, 399.

[3]United States *v.* Cleveland, P. & E. R. Co., 42 F. (2d) 413, 419. Burnet *v.* Bank of Italy, 46 F. (2d) 629, 630. Jos. Denunzio Fruit Co. *v.* Commissioner, 49 F. (2d) 41. Wadhams & Co. *v.* United States, 67 Ct. Cl. 235.

[4]Treasury Regulations 41, Art. 77; § 1331 (a), Revenue Act of 1921, 42 Stat. 319. § 336, House Bill 12863; § 240 (b), same Bill; Senate Report No. 617 (Senate Documents, Vol. 4, Document 310, 65th Congress, 3d. Session); H. R. Conference Report No. 1037, p. 15, same session. Regulations 45 (1920 ed.) Arts. 631, 633.

of Internal Revenue v. *City Button Works*, 49 F. (2d) 705. Affiliation on any other basis would not make against inequality or evasion. It would require very plain language to show that Congress intended to permit consolidated returns to depend on a basis so indefinite and uncertain as control of stock without title, beneficial ownership or legal means to enforce it. Control resting solely on acquiescence, the exigencies of business or other considerations having no binding force is not sufficient to satisfy the statute.

Judgment affirmed.

A true copy,

Test:

Clerk, Supreme Court, U. S.